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IN THE

Supreme Court of the United States

October Term, 1954

No. 389

Foreman & Clark, Inc., a corporation,

Petitioner,

vs.

National Labor Relations Board,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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[illegible]

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IN THE

Supreme Court of the United States

October Term, 1954

No. ....

FOREMAN & CLARK, INC., a corporation,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Foreman & Clark, Inc., prays that a writ of certiorari issue to review the final judgment of the Court of Appeals for the Ninth Circuit refusing to set aside a decision and order of the National Labor Relations Board based upon proceedings had in violation of Petitioner's constitutional rights of free speech and due process of law and in direct violation of the provisions of the National Labor Relations Act, as amended (hereafter referred to as the "Act"), and the Federal Administrative Procedure Act.

Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit [R. 409-432] is not yet reported. Copies of the Court's opinion and decree are appended.

The pertinent opinions of the National Labor Relations Board (hereafter referred to as the "Board") are as follows:

> Decision and Order dated August 31, 1951, reported in 95 NLRB 1504 [R. 8-13].*
>
> Supplemental Decision and Direction of Election dated January 16, 1952, reported in 97 NLRB 1080 [R. 52-56].
>
> Supplemental Decision and Denial of Motion, dated March 11, 1952, reported in 98 NLRB 530 [R. 93-98].
>
> Supplemental Decision, Order and Second Direction of Election dated October 21, 1952, reported in 101 NLRB 40 [R. 133-139].
>
> Order Denying Motion and Amending Second Direction of Election dated November 21, 1952 (not reported) [R. 156-159].
>
> Decision and Order dated June 3, 1953, reported in 105 NLRB No. 43 [R. 321-333].

Jurisdiction.

The judgment of the Court of Appeals was dated and entered on July 30, 1954. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

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*Reference is to record in the Court below, nine copies of which have been filed with the Clerk.

Questions Presented.

1. Does the Board have authority to hold a failure to bargain with a particular labor organization to be an unfair labor practice where such failure would have admittedly been lawful had the Board not set aside an election, at which the employees voted against being represented by such labor organization, solely because of the employer's expression of opinion concededly privileged under Section 8(c) of the Act, and within the scope of the First Amendment?

2. Was an election conducted by the Board among Petitioner's employees rendered invalid within the meaning of Section 9(c)(3) of the Act because of Petitioner's expression of opinion, concedely privileged under Section 8(c) and within the scope of the First Amendment, where the Board assigned as the sole ground for invalidating the election Petitioner's failure to give the Union an opportunity to reply to such employees on Petitioner's time and premises, although such opportunity had not been requested by the Union and Petitioner had no rule against Union solicitation on its premises?

3. Did the Court of Appeals misapprehend or grossly misapply the requirements of Section 10(f) of the Act and 10(e) of the Administrative Procedure Act in reviewing Petitioner's contention that the Board's holding that Petitioner's employees performing alterations work constituted an appropriate unit separate from other employees was made on the controlling basis of the extent to which the employees had organized contrary to Section 9(c)(5)

of the Act, where the Court did not review the whole record, ignored Petitioner's detailed specifications of the insufficiency of the evidence to support the findings, and completely ignored all prior decisions of the Board, including decisions expressly stating that alteration employees could not be separated from other employees to constitute a separate unit, since the only basis would be the extent to which the employees had organized?

4. Does the Board have authority to hold a failure to bargain with a particular labor organization to be an unfair labor practice where the entire proceedings were based upon the record of a prior representation proceeding which the Board first dismissed on the ground that the unit sought was not appropriate and subsequently

    a. reversed that determination on the Union's motion for reconsideration where the nature and requirements of such procedure had not been published in the Federal Register;

    b. reversed that determination without a hearing, basing that reversal on facts contained in the Union's motion which were not in the record of the hearing previously held, and which had been denied by Petitioner, and

    c. set aside an election at the request of the Union without affording Petitioner a hearing on facts put in issue by it and essential to the Board's decision?

Constitutional Provisions and Statutes Involved.

1. The First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. The Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. Section 8(c) of the National Labor Relations Act, July 5, 1935, c. 372, 49 Stat. 449; as amended by the Labor Management Relations Act, 1947, June 23, 1947, c. 120, Title I, §101, 61 Stat. 140, 29 U. S. C., §158(c):

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter if such expression contains no threat of reprisal or force or promise of benefit."

4. Section 9(c)(1) of the National Labor Relations Act, July 5, 1935, c. 372, 49 Stat. 449; as amended by the Labor Management Relations Act, 1947, June 23, 1947, c. 120, Title I, §101, 61 Stat. 143, 29 U. S. C., §159(c)(1):

> "Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> "(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or
>
> "(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

5. Section 9(c)(3) of the National Labor Relations Act, July 5, 1935, c. 372, 49 Stat. 449; as amended by the Labor Management Relations Act, 1947, June 23, 1947, c. 120, Title I, §101, 61 Stat. 143, 29 U. S. C. §159(c)(3):

> "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election."

6. Section 9(c)(5) of the National Labor Relations Act, July 5, 1935, c. 372, 49 Stat. 449; as amended by the Labor Management Relations Act, 1947, June 23, 1947, c. 120, Title I, §101, 61 Stat. 143, 29 U. S. C. §159(c)(5):

> "In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling."

7. Section 10(f) of the National Labor Relations Act, July 5, 1935, c. 372, 49 Stat. 449; as amended by the Labor Management Relations Act, 1947, June 23, 1947, c. 120, Title I, §101, 61 Stat. 146, 29 U. S. C. §160(f):

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such per-

> son resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

8. Section 3(a) of the Administrative Procedure Act, June 11, 1946, c. 324, §3, 60 Stat. 238, 5 U. S. C. §1002(a):

> "Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well

> as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

9. Section 10(e) of the Administrative Procedure Act, June 11, 1946, c. 324, §10, 60 Stat. 243, 5 U. S. C. §1009(e):

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

Statement of the Case.

This petition seeks review of a judgment of the Court of Appeals for the Ninth Circuit refusing to set aside, and enforcing, an order of the National Labor Relations Board directing Petitioner to bargain with the Amalgamated Clothing Workers of America, CIO, Local 297 (hereafter referred to as the "Union").

The Board's order directing Petitioner to bargain was based entirely upon its prior proceedings in a representation case as a result of which it certified the Union as the representative of a group of Petitioner's employees. Petitioner admittedly refused to comply with the Board's order solely because of major prejudicial errors in those proceedings.

The basis for federal jurisdiction in the Court of Appeals was invoked under Section 10(f) of the National Labor Relations Act, as amended (Act of June 23, 1947, c. 120, Title I, §101, 61 Stat. 146, 29 U. S. C. §160(f)), and under Section 10(c) of the Federal Administrative Procedure Act (June 11, 1946, c. 324, §10, 60 Stat. 243, 5 U. S. C., §1009(c)).

Foreman & Clark, Inc. is a Delaware corporation engaged in the retail sale of men's and women's clothing and accessories. It operated twelve retail stores in California, one in Washington and one in Missouri [R. 165, 171-172]. The Union's petition to the Board, as amended, sought certification as the representative of those employees performing minor alterations on ready-made clothing in the nine stores operated by Petitioner in Southern California [R. 1, 2, 3-5]. None of the employees in those stores had previously been represented by a labor organization.

Many of the employees performing alterations work did so only a portion of their time, also acting as salespeople, will call employees, clerks and janitors along with the other employees, for from 5% to 75% of their time [R. 175, 180-182, 184-196, 216, 217]. All employees were paid on the same basis and enjoyed the same benefits [R. 186, 187, 194, 196, 197, 203-208, 228-230]. In accordance with Petitioner's contention at the hearing the Board entered its order dismissing the Union's petition on the ground that the employees performing alterations did not constitute an appropriate unit for bargaining separate from the other employees [R. 8-13].

Although no such procedure is mentioned in the Board's Rules and Regulations or Statements of Procedure, over two months later the Union filed a Motion for Reconsideration of the Board's decision [R. 14-30]. Such motion was based almost entirely upon statements of the alleged skills of factory clothing workers, and the history of organization of such manufacturing workers, none of which appeared in the record of the case.

Although basing its action "on the entire record" of which the Union's motion formed a part, the Board, without any further hearing, completely reversed itself and directed that an election be held among the same group of alteration employees which it had previously held not to be an appropriate unit [R. 52-56].

The election was held pursuant thereto on April 4, 1952, and resulted in a majority vote against the Union [R. 103-104].

The Union filed objections and requested that the election be set aside on the ground that:

> "the management's representatives assembled the employees on the premises of the Company, during working hours of such employees, and there made statements against the Union, without the Union having the opportunity or the use of equal facilities to reply . . ." [R. 104-105].

On May 13, 1952, the Regional Director filed a report, based upon his *ex parte* investigation, recommending that the Board set aside the election on the ground that the Company made non-coercive and non-promising talks to the eligible employees in three of the nine stores two days prior to the election, and in the remaining six stores one day prior to the election, "and thereby denied the Petitioner (Union) an opportunity to reply under the same circumstances," despite the fact that he also found that the Union had not at any time requested such opportunity [R. 105-109].

He made no finding as to when the Union had first learned of the employer's talks, his report stating only:

> "There is evidence that some of the employees knew a few days in advance that Thomas was going to visit them, but representatives of Petitioner (Union) deny that they knew of the speeches before the evening of April 3" [R. 107].

On May 22, 1952, Petitioner filed Exceptions to the Report, admitting that non-coercive and non-promising speeches had been made to the employees but contending that the setting aside of the election because of such speeches would directly contravene Section 8(c) of the Act and the guaranty of freedom of speech in the First Amendment to the Constitution of the United States.

The Exceptions concluded that if the Board believed it could set aside an election solely because of speeches to employees which contained no threat of reprisal or force or promise of benefit, then

> "a hearing would be necessary to determine the facts with reference to the opportunities available to Petitioner (Union), and availed of by it, to make known its views to the employees" [R. 109-133].

On October 21, 1952, and without having held any hearing, the Board ordered that the election held on April 4, 1952, be set aside and a new election conducted on the ground

> "that by timing the speech in this manner the Employer made impossible the holding of any further meeting before the election and thereby, in effect, denied the Union an opportunity to speak under comparable circumstances." [R. 133-139.]

On November 3, 1952, Petitioner filed a motion to vacate, again specifically requesting a hearing for the purpose of developing facts essential to the decision of the Board [R. 139-156]. This motion was denied by the Board [R. 156-159].

On January 9, 1953, at a time within 12 months of the election of April 4, 1952, the second election ordered by the Board was held among the employees in the same unit in which such first election was held. This second election resulted in a majority of votes cast for the Union [R. 159-160].

Based on the results of this second election, the Board, on January 19, 1953, issued its Certification of Representatives in which it certified the Union as the representative of the employees in the designated unit [R. 160-161].

Upon Petitioner's refusal to recognize the validity of that certification, a complaint was issued, alleging that Petitioner had refused to bargain collectively with the Union in violation of the Act [R. 294-297].

At the hearing thereon, no evidence was introduced by either party other than the record of the representation proceeding [R. 334-359], and in its order directing Petitioner to bargain, the Board affirmed all of

> "its rulings, findings, conclusions, determinations, orders and certification made in the representation case." [R. 321-333.]

From the Board's order of June 3, 1953, Petitioner filed its petition to review and to set aside this order. The Court of Appeals denied such petition, granting the cross-petition of the Board for enforcement.

ARGUMENT.

This cause involves questions of major public importance in the administration of the National Labor Relations Act, as amended in 1947. By the Labor Management Relations Act, 1947 (June 23, 1947, c. 120, 61 Stat. 136), Congress placed "brakes" upon the discretion of the Board, no less than three of which were flouted by the Board in its proceedings here. They are:

1. The provision designed to afford employers the full right of free speech (Sec. 8c).
2. The section prohibiting a new election in the same unit within one year of a prior valid election (Sec. 9(c)(3)).
3. The prohibition against determining an appropriate unit for bargaining on the controlling basis of the extent to which the employees have organized (Sec. 9(c)(5)).

Each of those provisions comes into play in the day to day administration of the Act by the Board. The anachronistic decision of the Court of Appeals sweeps away those "brakes" as if they were non-existent and places actions of the Board in violation thereof beyond remedy. It has decided important questions of federal law in conflict with applicable decisions of this Court and of other Courts of Appeals, and has condoned the Board's denial of procedural due process to an employer on factual issues directly affecting him.

Further, this cause presents for the first time to this Court the important question of the effect of lack of compliance by an administrative agency with the public information requirements of the Administrative Procedure Act.

The Free Speech Issue.

1. The decision of the Court of Appeals is in conflict with decisions of the Courts of Appeals for the Second and Sixth Circuits.

In its decision below, the Court affirmed the Board's action in setting aside the first election because of a protected, non-coercive and non-promising speech by Petitioner to its employees where the sole ground assigned by the Board was that Petitioner failed to give the Union an opportunity to speak to such employees on company time and premises, although such opportunity had not, in fact, been requested.

This ruling of the Board was an application of its "Bonwit Teller" doctrine, first enunciated by the Board in *Bonwit Teller, Inc.*, 96 NLRB 608 (1951). There the Board held that an employer who made an otherwise privileged speech concerning a coming election to his employees on company time and premises was guilty of interference under Section 8(a)(1) of the Act and of conduct sufficient to set aside the election if he denied the Union's request for an opportunity to reply on his time and property. Member Reynolds dissented on the ground that hinging the employer's right to speak upon his furnishing such facilities to the Union effectively emasculates Section 8(c) of the Act.

On review of the Board's decision, the Second Circuit, by a divided court, held in *Bonwit Teller, Inc. v. National Labor Relations Board,* 197 F. 2d 640 (C. A. 2nd Cir., 1952), *cert. den.* 345 U. S. 905, 97 L. Ed. 1342, 73 S. Ct.

644 (1953), that an employer who chooses to speak to his employees on his own time and premises, is obligated to give the union equal opportunity to reply *only if he enforces a no-solicitation rule* forbidding all soliciting by Union organizers in his store during the employees' working time or when they were off duty. The limited extent to which the Second Circuit sanctioned the *Bonwit Teller* rule, in direct contrast with the complete approval which the Ninth Circuit gave to that rule in this case, is shown by the Second Circuit's statement in the majority opinion that:

> "As we have indicated above, the violation here was the discriminatory application of the non-solicitation rule. If Bonwit Teller were to abandon that rule, we do not think it would then be required to accord the Union a similar opportunity to address the employees each time Rudolph made an anti-union speech. Nothing in the Act nor in reason compels such 'an eye for an eye, a tooth for a tooth' result so long as the avenues of communication are kept open to both sides." (197 F. 2d 640 at 646.)

Enforcement of the Board's order was denied and the case remanded to the Board to proceed in accordance with the opinion.

Chief Judge Swan dissented on the ground that Section 8(c) of the Act precluded the Board from finding an unfair labor practice on the failure to grant the union's request for an opportunity to reply and would have denied enforcement of the Board's order without remand for further proceedings.

The issue came before the Second Circuit again in *National Labor Relations Board v. American Tube Bending Co., Inc.,* 205 F. 2d 45 (C. A. 2nd Cir., 1953). In that case the Board's order was limited to requiring the employer to cease and desist from "discriminatingly applying its no-solicitation rule" because of a refusal of a union's request for an opportunity to reply on company time and premises to the employer's speech to its employees. In enforcing the Board's order, the Court split three ways. The principal opinion by Judge L. Hand stated:

> "Our decision in Bonwit Teller, Inc. v. National Labor Relations Board, 2 Cir., 197 F. 2d 640, rules the case at bar. There we said that it was an unfair labor practice for the employer to exercise his privilege under §8(c) of addressing his employees on the premises and arguing against the formation of a union, if he imposed a 'no solicitation' rule against union agitation on the premises.
>
> * * * * * * * *
>
> "We rested our decision wholly upon the exception and reversed that part of the Board's order that had held it an unfair labor practice for an employer to address his employees on the premises during working hours, where he had refused to allow the representative of the union an equal privilege.
>
> "If therefore the Board's order in the case at bar had depended upon the respondent's refusal, or failure, to allow Curran to address the employees on the property during working hours it could not stand."

Chief Judge Swan concurred in the result "because constrained by the majority opinion in the Bonwit Teller case . . ." Judge Frank concurred in the result but did not

> ". . . join in the statement that it is not an unfair labor practice for an employer to address his em-

> ployees in working hours if only the employer permits union solicitation in non-working hours."

The issue came before the Sixth Circuit in *National Labor Relations Board v. F. W. Woolworth Co.,* 214 F. 2d 78 (C. A. 6th Cir., 1954). Contrary to the Second Circuit, the Sixth Circuit held that an employer is not required to allow a union the opportunity to answer an employer's pre-election speech on company time and premises *even though the employer enforces a no-solicitation rule,* and refused enforcement of the Board's order.

Like the Second Circuit, however, the Sixth Circuit split three ways in its decision. In the principal opinion, Judge Allen stated that "the dissenting opinion of Chief Justice Swan in the Bonwit Teller case is the correct holding . . . " and that

> "To decide that a no-solicitation rule deprives the employer of the right to confer with his employees about any important matter, including unionization, is to deprive him of the freedom of speech specifically guaranteed by the Constitution and by Section 8(c) of the Act."

Judge Miller, concurring, agreed that a simple denial of a union's request for an opportunity to reply to an employer's pre-election speech on company time and premises would not be a violation of the Act, but that perhaps such denial could be a violation if the employer had enforced an invalid no-solicitation rule, which was not the case and was not decided. Judge McAllister, dissenting, stated that "there is no issue of freedom of speech in this case" although also stating

> "The unfair labor practice upon which the Board's order was based was the making of such speeches

> while, at the same time, enforcing a rule prohibiting the solicitation of its employees on its premises at any time by union representatives."

He concluded that a portion of the employer's no-solicitation rule was invalid and that the Board's order should be enforced.

Although the decision of the Court below was unanimous, the variety of opinion on this issue is most effectively illustrated by the 4 to 1 decision of the Board in this cause in setting aside the first election [R. 133-139], the 4 to 1 decision of the Board in its original *Bonwit Teller* decision (96 NLRB 608), the 2 to 1 decision of the Second Circuit in the *Bonwit Teller* case, the 3-way split of the Second Circuit in the *American Tube Bending* case, the 3-way split of the Sixth Circuit in the *F. W. Woolworth* case, and the fact that the newly constituted Board, by a 3-1 vote, has recently abandoned the doctrine that the refusal by an employer to grant the union an opportunity to reply to a preelection speech on company time and premises is an unfair labor practice in itself, and adopted the holding of the Second Circuit in the *Bonwit Teller* case that such refusal is an unfair labor practice only if the employer enforces an unlawful no-solicitation rule or a broad no-solicitation rule privileged because of the character of his business (*Livingston Shirt Corporation,* (107 NLRB No. 109).

The holding of the Ninth Circuit below is directly contrary to the decision of the Sixth Circuit in the *F. W. Woolworth Co.* case. Since Foreman & Clark did *not* enforce a no-solicitation rule, in fact had no such rule, the decision below is also directly contrary to the decisions of the Second Circuit.

2. The decision below is in conflict with a decision of the Court of Appeals for the Eighth Circuit.

In its holding here the Court below affirmed the Board's ruling that an election should be set aside solely because Petitioner here spoke to its employees on company time and premises and, in effect, denied the Union a similar opportunity to speak to them, even though no such opportunity had ever been requested. The Court treated as irrelevant the fact that subsequent to all of its decisions in this case, the Board itself repudiated and reversed this doctrine and held that the mere denial of such a request by a union was neither an unfair labor practice under Section 8 nor sufficient to set aside an election (*Livingston Shirt Corporation,* 107 NLRB No. 109; *Peerless Plywood,* 107 NLRB No. 106).

In its *Livingston Shirt* decision the Board "reverses the broad *Bonwit Teller* decision," and holds

> "that, in the absence of either a privileged or an unlawful broad no-solicitation rule, an employer does not commit an unfair labor practice if he makes a non-coercive speech to his employees and denies the union an opportunity to reply on company premises." (107 NLRB No. 109.)

In its *Peerless Plywood* decision the Board similarly reversed the *Bonwit Teller* doctrine as applied to election cases and announced

> "an election rule which will be applied in all election cases. This rule shall be that employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within twenty-four hours before the scheduled time for conducting an election." (107 NLRB No. 106.)*

The Court below held that the Board's reversal of the very rule applied by it here was "irrelevant" and stated that "the Board need not be haunted by that 'foolish consistency' which 'is the hobgoblin of little minds.' "

In that view the Court below is in direct conflict with the Court of Appeals for the Eighth Circuit in its decision in *National Labor Relations Board v. National Gas Co.* (not yet reported), rendered on August 10, 1954, eleven days after that of the Ninth Circuit here. In that case the Eighth Circuit denied enforcement of a cease and desist order of the Board including, as here, refusing to bargain, where, as here, the Board reversed the rule under which it acted in the case during the pendency of the review and enforcement proceedings in the Court of Appeals, and despite the fact that there, as here, the Board

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*In the Court below, the Board contended that its order should be enforced under the *Peerless Plywood* rule, notwithstanding its repudiation therein of the basis of its order setting aside the first election here. But "a reviewing court, in dealing with a determination which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." (*Securities and Exchange Commission v. Chenery Corporation*, 332 U. S. 194, 196, 91 L. Ed. 1995, 1999, 61 S. Ct. 1760 (1946).)

determined "to proceed to obtain an order of enforcement in this case.' The Court said:

> "The Board is asking this court to enforce an order which it entered upon a state of facts which the Board has later expressly held to be insufficient to justify its taking or exercising jurisdiction under the statute from which its powers are derived.
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> * * * * * * * *
>
> "Since our duty is to apply the law in its present form, and not as it existed at the time of the decision and order below (citing cases), we must decline to grant the petition for enforcement."

Within the past year, the Board has reversed a series of its former holdings and rules. The major importance of the effect of such reversals upon pending cases is well illustrated by this direct conflict in decision between the Eighth and Ninth Circuits. A decision by this Court is of very substantial importance in the administration of labor problems under the Act.

3. The decision below involves a question of far-reaching importance in the administration of the National Labor Relations Act, as amended, which has not been, but should be, settled by this Court.

Large numbers of elections have been and are being set aside by the Board solely because of non-coercive and non-promising speeches. Since such orders are not directly reviewable but must await review in subsequent unfair labor practice proceedings, it may be years before they reach the courts, if ever. The important question of federal law involved has not been, but should be, determined by this Court.

In 1947, Congress adopted Section 8(c) of the Act in the Labor Management Relations Act of 1947 (Act of June 23, 1947, c. 120, Title I, §101, 61 Stat. 140, 29 U. S. C., §158(c)), which provides:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

Although the Court below makes no specific reference in the body of its opinion to Section 8(c), the clear effect of its decision is to hold that the Board may disregard the letter and the policy of that section in representation proceedings.

Prior to the passage of Section 8(c), the issue of employer free speech was in constant turmoil. For several years after its inception in 1935, the Board had taken the view that almost any statement made about the Union by an employer constituted interference under Section 8(a)(1) of the Act, and it was not until well after the decision of this Court in *NLRB v. Virginia Electric and Power Co.,* 314 U. S. 469, 86 L. Ed. 348, 62 S. Ct. 344 (1941), that the Board acknowledged that an employer, too, had a constitutional right of free speech.

But in 1946, the Board adopted a new theory and originated its so-called "captive audience" or "compulsory audience" doctrine, when in *Clark Bros. Co., Inc.,* 70 NLRB 802 (1946), it found that the mere fact that the employees were assembled in the plant during working time to listen to an anti-union speech by the employer was itself an unfair labor practice, regardless of the non-coercive character of the speech itself.

That Section 8(c) was adopted by Congress with the intent of settling once and for all the controversy over the right of the employer to speak to his employees on company time and premises, is clearly shown by the expression of purpose of Section 8(c) set forth in Senate Report No. 105 on Senate Bill 1126, reading at page 23 as follows:

> " 'Section 8(c): Another amendment to this section would insure both to employers and labor organizations full freedom to express their views to employees on labor matters, refrain from threats of violence, intimation of economic reprisal, or offers of benefits. The Supreme Court in *Thomas v. Collins* (323 U. S. 516), held, contrary to some earlier decisions of the Labor Board, that the Constitution guarantees freedom of speech on either side in labor controversies and approved the doctrine of the *American Tube Bending* case (134 F. 2d 993). The Board has placed a limited construction upon these decisions by holding such speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated (*Monumental Life Insurance,* 69 NLRB 247) or if the speech was made in the plant on working time (*Clark Brothers,* 70 NLRB 60). The committee believes these decisions to be too restrictive and, in this section, provides that if, under all the circumstances, there is neither an express or implied threat of reprisal, force, or offer of benefit the Board shall not predicate any finding of unfair labor practice upon the statement. (Senate Report No. 105, 80th Congress, 1st Session, 1 Leg. Hist. LMRA, pp. 429-430.)"

That Congress intended that the Board should be prevented from considering an employer's non-coercive and non-promising speech to his employees on the employer's time and premises as constituting or as evidence of an unfair labor practice is clear beyond dispute. The Board and the Court below, however, apparently attempt to justify the ignoring of Section 8(c) on the ground that the setting aside of an election is not the determination of an "unfair labor practice" which is defined in Section 2(8) of the Act as meaning "any unfair labor practice listed in Section 8." But the expressed intent of Congress was to "insure both to employers and labor organizations full freedom to express their views to employees on labor matters . . ." Rather than a limitation to particular proceedings, Congress was establishing a consistent policy controlling this entire field.

A further examination of the wording of Section 8(c) and its background leads clearly to the conclusion that Congress intended it to refer to unfair labor practices sufficient to set aside elections as well as those under Section 8.*

A. If Congress intended Section 8(c) to apply only to unfair labor practices under Section 8, it need not have added the words "under any of the provisions of this subchapter." To confine Section 8(c) to unfair labor practices listed in Section 8 would be to render those words meaningless.

B. The Senate Report on the bill (*supra*) refers to two decisions of the Board as being "too restric-

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*This Court has already held that terms used in the Act are not used in their defined sense in all its provisions. (*Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 191, 85 L. Ed. 1271, 61 St. Ct. 851.)

tive." One of those decisions, that in *Monumental Life Insurance,* 69 NLRB 247, did not involve an unfair labor practice proceeding under Section 8, but an order of the Board in a representation proceeding setting aside an election.

C. Prior to 1947, the Board did not set aside elections because of conduct of the ***employer*** unless such conduct constituted an unfair labor practice. It was not until 1948, after the adoption of Section 8(c), that the Board, by a 3 to 2 vote, held that it could set aside an election for employer conduct even though such conduct was not in itself an unfair labor practice (*General Shoe Corp.,* 77 NLRB 124). At the time Section 8(c) was adopted by Congress, conduct of an employer on the basis of which the Board set aside elections was referred to by the Board as "unfair labor practices." (*e.g., Semet-Solvay Co.,* 68 NLRB 352 (1946); *Monumental Life Insurance Co.,* 69 NLRB 247 (1946); *Colgate-Palmolive-Peet Co,* 70 NLRB 1202 (1946).)

D. If neither the letter nor the policy of Section 8(c) precluded the Board from setting aside an election solely because of a non-coercive and non-promising speech by an employer to his employees, an anomalous result is reached. The Board would be enabled to do indirectly what it could not do directly. For though it could not issue a direct cease and desist order to the employer against speaking, it could accomplish the same result by setting aside any election before which an employer expressed his views, and continue to do so, until as a result the employer either gave up his right of speech or acquiesced in the condition imposed thereon that he afford equal facilities to the Union. By this method of indirection the Board would, under the holding of the Court below, be free from any judicial review, since only a direct cease and desist order against speaking would give rise to that review. That result would be directly contrary to the clearly expressed purpose of Congress.

For some 3 years after its adoption the Board itself recognized that Section 8(c) applied to proceedings in representation cases to set aside elections because of employer pre-election speeches to employees in the plant during working hours. (*Babcock & Wilcox,* 77 NLRB 577 (1948).) In fact it appeared that the matter had been finally and completely settled when in 1950 the Board held that pre-election speeches made to employees in the plant during working hours were protected free speech, and directly held that an election should not be set aside because of a refusal of a union's request for an opportunity to address the employees in the plant on working time, though the employer had done so. (*S. & S. Corrugated Paper Machinery Co.,* 89 NLRB 1363 (1950).)

Unfortunately, the Board's recognition of the employer's freedom of speech, reflected in its *Babcock* and *S. & S. Corrugated Paper Machinery* decisions was short lived. Foreclosed from resurrecting its captive audience theory, it effected the same purpose by overruling its decision in the *S. & S. Corrugated Paper Machinery* case and by enunciating the so-called "Bonwit Teller" "equal access" doctrine. (*Bonwit Teller, Inc.,* 96 NLRB 608 (1951).)

The three-way conflict in the decisions of the Courts of Appeals illustrates the extent to which the Board has succeeded in reopening the door to the turmoil and confusion which even it, for a time, had conceded had been resolved by the passage of Section 8(c) of the Act.

4. The decision of the Court of Appeals relating to the right of free speech of employers in representation proceedings is in conflict with applicable decisions of this Court.

In *Thomas v. Collins,* 323 U. S. 516, 89 L. Ed. 430, 65 S. Ct. 315 (1945), this Court held that a requirement of simple registration prior to soliciting members for, or membership in, a labor union "was restriction upon Thomas' right to speak" (323 U. S. 516 at 534), and "quite incompatible with the requirements of the First Amendment." (323 U. S. 516 at 540.)

In unmistakable language, this Court approved its prior holdings that an employer's speech in labor matters was constitutionally protected and indicated the limits which could be placed on that right, saying:

> "Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. National Labor Relations Bd. v. Virginia Electric & P. Co., 314 U. S. 469, 86 L. ed. 348, 62 S. Ct. 344. Decisions of other courts have done likewise. When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. But short of that limit the employer's freedom cannot be impaired." (323 U. S. 516 at 537-538.)

That a requirement that an employer grant a union the use of his premises and the paid time of his employees as a condition of his own right to speak to his employees is a restriction upon his right to speak, seems beyond question.

The Court below justified its holding that "there was no interference with the Company's freedom of speech in this proceeding" solely on the ground that representation proceedings are "essentially informal, not adversary" and "not even litigation, but investigation." But the result of those proceedings is compulsion. As in this case, they are preliminary to an order requiring compliance by Petitioner, enforcible by court decree and contempt proceedings.

And where, as here, except for such restraint on its right to speak, Petitioner would not have been subject to such order, court decree and possible contempt proceedings, the restraint becomes very real indeed.

To hold otherwise would be to enable the Board to do indirectly what this Court said in *Thomas v. Collins* could not be done directly, *i. e.*, place a condition on the right to speak having no relation to coercion. And, under the holding of the Court below, the Board could effectually enforce this condition on speech by repeatedly setting aside elections, without possibility of judicial review to protect the freedom of speech guaranteed by the First Amendment.

Appropriate Unit.

5. The Court below, by its cursory review of the Board's finding of an appropriate unit in the face of Section 9(c)(5) of the Act, has decided an important question of federal law in a way in conflict with applicable decisions of this Court.

In *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 95 L. Ed. 456, 71 S. Ct. 456

(1951), this Court held that the 1947 amendment to Section 10(f) of the Act and the provisions of Section 10(e) of the Administrative Procedure Act requiring courts to review *the whole record* before an agency, had meaning and that:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

The court below misapprehended and grossly misapplied this standard of review in its determination that "there was substantial evidence to support the Board's unit determination." [Op. p. 10; R. 418.]

Prior to 1947, the Wagner Act provided:

> "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." (Act of July 5, 1935, c. 372, 49 Stat. 449, 453, §10(e), 29 U. S. C., §160(e).)

The Court below reverted to the Wagner Act standard of review here. On two occasions in the opinion the Court below referred to the standards by which it reviewed the Board's findings here as "The Board's findings of fact, if supported by substantial evidence, *shall* be conclusive" [Op. p. 12; R. 420], and "If, as here, they are supported by substantial evidence, they must stand" [Op. pp. 14-15; R. 422-423].

This patent misapplication of the standards for review lies in the complete ignoring of the requirement that the reviewing court must consider the record as a whole. It becomes even more flagrant in the light of the fact that the employees performing alterations work could be separated from Petitioner's other employees to constitute a separate unit *only by using as a controlling basis for such finding the extent to which the employees had organized.* The Board's use of that factor as controlling, although previously approved by this Court in upholding a Board finding of a unit similar to that here (*May Department Stores Co. v. National Labor Relations Board,* 326 U. S. 376, 90 L. Ed. 145, 66 S. Ct. 203 (1945), had been denied to the Board by Congress by the adoption of Section 9(c)(5) of the Act in 1947. That the Board's findings should have been carefully reviewed is apparent, from the Report of the House Committee on Education and Labor on Section 9(f)(3) of the House bill (H. R. 3020) which section became Section 9(c)(5) of the Act, which stated:

> "Section 9(f)(3) strikes at a practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. *Sometimes, but not always, the Board pretends to find reasons other than*

> *the extent to which the employees have organized as grounds for holding such units to be appropriate* . . ." (Emphasis added.) (H. Rep. No. 245, 80th Cong., 1st Sess., 1 Leg. Hist. LMRA, 292, 328.)

The opinion below reveals no evidence that "The court painstakingly reviewed the record" as this Court has approved (*National Labor Relations Board v. Pittsburgh Steamship Company,* 340 U. S. 498, 502, 95 L. Ed. 479, 71 S. Ct. 453 (1951)), and as was undertaken by the only other Courts of Appeals faced with similar contentions that the Board's unit finding was based on extent of organization. (*National Labor Relations Board v. Smythe,* 212 F. 2d 664 (C. A. 5th Cir., 1954); *National Labor Relations Board v. Stanolind Oil & Gas Co.,* 208 F. 2d 239 (C. A. 10th Cir., 1953).)

One illustration of the fact that the Court below did *not* consider the whole record is readily apparent from the fact that the Court devoted more than two pages of its opinion [Op. pp. 8-10; R. 416-418], to discussion of a statement of Petitioner's counsel at the initial hearing that Petitioner made "no contention that if a unit of tailor shop employees should be found appropriate . . . the unit should not include . . . all of the employees who are shown on the company's job classifications as listed on Board's Exhibit No. 2" (a list of the 45 employees performing alterations work, of whom many spent portions of their time performing alterations work and other portions of their time, ranging from 5% to 75%, performing the same work as other employees, such as sales, will call, clerical and janitorial) and made no mention of the facts that

1. in the same breath Petitioner's counsel also stated that "The company's position as to the unit is that

the tailor shop employees do not constitute an appropriate unit in themselves" [R. 169], and

2. subsequently that "The company's position with respect to these individuals is that they furnish one of the reasons why the unit requested here is not appropriate" [R. 258].

Manifestly the fact that many of the employees sought to be separated from the other employees as an appropriate unit actually performed the same tasks as those of other employees would constitute a persuasive reason against the appropriateness of such unit. The Court below, in ignoring that portion of the record as well as the full statements of counsel certainly did not consider the entire record.

That there was very substantial basis for Petitioner's contention that the controlling basis for the Board's finding that the alteration employees constituted an appropriate unit separate from other employees was extent of organization, readily appears from the facts, that

1. In its original decision, the majority of the Board panel found "no persuasive reason why the alteration shop employees should constitute a separate appropriate unit on a craft, professional or departmental basis" [R. 9], yet on the same evidence, without a further hearing, three other members of the Board reversed that finding and found the unit appropriate.

2. Since the adoption of Section 9(c)(5) in 1947, the Board itself has consistently held that alteration employees of a retail department or clothing store may

not constitute an appropriate unit separate from other employees.

Carson Pirie Scott & Co., 75 NLRB 1244 (1948);

Mandel Bros., Inc., 77 NLRB 512 (1948);

Robertson Brothers Department Store, Inc., 95 NLRB 271 (1951);

George B. Peck's, Inc., 96 NLRB 293 (1951).

3. In two of those decisions (*Mandel Bros, Inc.* and *George B. Peck's, Inc.*), the Board itself directly held that "because of the subsequent passage of the Labor Management Relations Act, 1947, we are now precluded from finding such a unit to be appropriate under comparable circumstances." (77 NLRB 512 at 513.)

4. Since the adoption of Section 9(c)(5) in 1947, the Board has consistently included alteration employees within broad units of selling and non-selling employees of retail department and clothing stores.

Thomas & Co., 104 NLRB No. 122 (1953);

National Shirt Shops of Florida, Inc., 97 NLRB 924 (1951);

Cherry and Webb Company, 93 NLRB 9 (1951);

Silverwoods, 92 NLRB 114 (1950);

Grossman Department Store, Inc., 90 NLRB 275 (1950);

Block and Kuhl Co., 90 NRLB 258 (1950);

J. C. Penney Co., 86 NLRB 109 (1949);

Bond Stores, Incorporated, 84 NLRB 667 (1949);

Robinson-Schwenn Store, 83 NLRB 35 (1949);

Sears Roebuck & Co., 76 NLRB 167 (1948).

In Petitioner's Opening Brief to the Court of Appeals, Petitioner (1) referred to those holdings of the Board and pointed out to the Court the seven findings of fact contained in the Board decision; (2) reviewed the evidence in the record applicable to each, the lack of sufficient evidence to support each finding and twenty-one specifications where the evidence was directly contrary to the finding (pp. 62-72); (3) analyzed the criteria which had consistently been applied by the Board in its decisions determining whether groups of employees of retail department and clothing stores should constitute appropriate units separate from other employees and the fact that each of those factors negatived such separation here (pp. 72-75); and (4) analyzed each fact in the *Robertson Brothers* case (*supra,* where less than six months prior to its decision here the Board held that a similar group of alteration employees should not be separated from other employees to form a separate unit) in comparison with those here and pointed out that no factual distinction was possible other than that in the *Robertson Brothers* case the employees had previously been organized on a broad basis whereas here only the alteration employees had been the subject of organization (pp. 57-61).

The same points had consistently been presented to the Board and were in the record [R. 31-52, 57-93].

Yet in the face of this detailed analysis of the evidence and prior Board decisions, the opinion below makes not a single reference to (1) any prior Board decision; (2) the Board's own holdings that the controlling basis for similar units was extent of organization; (3) any factors usually considered by the Board in determining the separation of such groups as units, or (4) any single instance in which Petitioner attacked the finding of the Board as unsupported by substantial evidence on the record as a whole and the evidence supporting such finding. Apparently the Court concluded that in view of the great weight accorded to agency findings in the courts it would be useless to review the whole record, saying:

> "In the face of such massive authority, it is late in the day to scrutinize with a microscope the fact findings of the Board. If, as here, they are supported by substantial evidence, they must stand." [Op. pp. 10-11; R. 422-423.]

In the light of the "brake" put upon the discretion of the Board by Congress by its adoption of Section 9(c)(5) in 1947, and the expressed view of Congress that

> "sometimes . . . the Board pretends to find reasons other than the extent to which the employees have organized as grounds for holding such units to be appropriate,"

it would seem particularly inappropriate for a Court of Appeals to refuse to consider the entire record.

When the opinion of the court below is examined in the light of all the facts, it is apparent that the Court did not consider the whole record as it was required to do under this Court's decision in the *Universal Camera* case.

Due Process.

6. The decision below is in conflict with a decision of the Court of Appeals for the Fifth Circuit.

The Board's order setting aside the first election was made without a hearing and was based solely upon a Report of its Regional Director rendered after an *ex parte* investigation. In its exceptions to that Report, Petitioner had placed in issue the facts with reference to the Union's opportunities to speak to the employees and demanded a hearing on those facts [R. 133]. The Board's decision to set aside the election turned on the alleged lack of such opportunities [R. 133-139].

The Court below concluded that the "great latitude" given the Board as to procedure relating to elections made it unnecessary for the Board to hold such a hearing and that Petitioner had no standing to demand such hearing.

That holding is in direct conflict with the decision of the Fifth Circuit Court of Appeals in *National Labor Relations Board v. Sidran,* 181 F. 2d 671 (C. A. 5th Cir., 1950). There the Fifth Circuit considered the exact question at issue here—whether the Board properly found that the employer's refusal to bargain with the Union was in violation of the Act where the Regional Director had determined issues raised by objections and exceptions to challenged ballots at the election without affording the employer a hearing.

The Court held that the consent election agreement did not amount to a waiver of the employer's right to a hearing and denied the petition for enforcement, stating:

> "The report was admittedly based upon an undisclosed *ex parte* investigation, and no hearing was ever held to support it. Respondent had no oppor-

> tunity to be heard, to examine and cross-examine witnesses, or to produce any evidence in his own behalf which might have tended to impeach or contradict the facts found by the Regional Director as to the status of those challenged employees. Manifestly, the Board's action in considering such report was not within its discretionary power, but under the circumstances arbitrarily deprived respondent of a fair trial" (181 F. 2d 671, 673).

7. The decision below has decided important questions of federal law relating to the applicability of procedural due process requirements to representation proceedings conducted by the Board, which have not been, but should be settled by this Court.

The denial to Petitioner of a hearing on the issues raised by it respecting the setting aside of the first election, was not the sole instance of the Board's refusal of a hearing on issues of fact in the representation proceedings.

The Board's first order in this case dismissed the Union's petition on the ground that the employees performing alterations work did not constitute an appropriate unit for bargaining separate from the other employees [R. 8-13]. The Union's subsequent motion for reconsideration was based almost entirely upon new facts not in the record of the previous hearing held pursuant to Section 9(c)(1) of the Act [R. 14-30]. Without any further hearing, though basing its action "on the entire record" which under its rules includes all motions (Rules and Regulations of the National Labor Relations Board, Series 6, Sec. 102.57, 13 F. R. 5656), the Board completely reversed itself and held that the alterations employees did constitute an appropriate unit separate from other employees [R. 52-56]. Petitioner's subsequent motion for a hearing on the facts set forth in the Union's motion was denied [R. 93-98].

At the hearing on its unfair labor practice complaint against Petitioner, the Board brought forth no witnesses as to these or any other facts and relied entirely upon the record in the representation proceedings [R. 334-370]. The Court below apparently reached the conclusion that since a hearing had once been held, it was neither a denial of the hearing required by Section 9(c)(1) of the Act, nor a denial of due process, for the Board to consider, and include in the record on which it based its finding, evidence not adduced at such hearing.

But it is difficult to believe that Congress intended the hearing required under Section 9(c)(1) to be a *partial hearing*. Nor does a partial hearing satisfy the requirements of due process. As this Court stated in the first *Morgan* case:

> "There must be a *full hearing*. There must be evidence adequate to support pertinent and necessary findings of fact. *Nothing can be treated as evidence which is not introduced as such.*" (Emphasis added.) (*Morgan v. United States*, 298 U. S. 468, 480, 80 L. Ed. 1294, 1295, 56 S. Ct. 906 (1935).)

This Court has also stated that due process includes the right to "conduct cross-examination material to the issue" and that

> "findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed." (*National Labor Relations Board v. Indiana & Michigan Electric Co.*, 318 U. S. 9, 87 L. Ed. 579, 63 S. Ct. 394 (1942).)

It was the lack of such opportunity to cross-examine and to produce evidence to impeach the facts set forth by the Union in its motion, which is the essence of the denial of a full hearing here.

In *Pittsburgh Plate Glass Co. v. National Labor Relations Board,* 313 U. S. 146, 85 L. Ed. 1251, 61 S. Ct. 908 (1941), this Court clearly indicated the tie-in of unit hearings in representation cases to subsequent unfair labor practice hearings based upon such unit findings by these statements in the majority opinion:

> "To reach a conclusion upon the complaint under consideration against the Company of unfair labor practices, violating §8, subsections (1) and (5) of the National Labor Relations Act, the validity of the Board's decision as to the appropriate unit must be decided. As the unfair practice charged was the refusal to bargain collectively because of the inclusion of the Crystal City employees in the unit, if they were improperly included the complaint fails.
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> * * * * * * * *
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> "While the ruling of the Board determining the appropriate unit for bargaining is not subject to direct review under the statute, the ruling is subject to challenge when, as here, a complaint of unfair practices is made predicated upon the ruling.
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> * * * * * * * *
>
> "The unit proceeding and this complaint on unfair labor practices are really one."

Although a majority of this Court there held that due process had not been denied to the employer in the refusal of the board to receive evidence proffered by him at the unit hearing and the unfair labor practice hearing, there was no suggestion in either the majority or dissenting opinions that the employer was not entitled to due process at the unit hearing.

The decision of the Court below has obvious implications of far reaching effect in the administration of the Act in its apparent holding that the discretion granted to the Board by the Act justifies it in ignoring the requirements of due process in a unit hearing, upon the record of which it bases a finding of unfair labor practice. Such a holding requires the intervention of this Court to settle the question.

Administrative Procedure Act.

7. The Court below has decided an important question of federal law relating to the effect of non-compliance by an administrative agency with the public information requirements of the Administrative Procedure Act, which has not been, but should be, settled by this Court.

The Board's order reversing its original dismissal of the petition in the representation case was made upon the union's "motion" for reconsideration filed some two months after the dismissal [R. 52-56].

It is undisputed that the Rules and Regulations of the Board and its Statement of Procedures published in the Federal Register, made no reference to reconsideration or rehearings, although Section 3(a) of the Administrative Procedure Act (June 11, 1946, c. 324 § 3, 60 Stat. 238, 5 U. S. C. § 1002(a) provides that:

> "(a) Every agency shall separately state and currently publish in the Federal Register . . . (2) statements of the general course and method by which

> its functions are channeled and determined, including the nature and requirements of *all* formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations. . . . No person shall in any manner be required to resort to organization or procedure not so published." (Emphasis added.)

The Court below held that Section 3(a) was a shield and not "a sword by which a petitioner can strike down the agency's order, on the ground that the agency *has not authorised itself* to issue that type of order, by publishing a statement in the Federal Register" [Op. p. 23, R. 431].

But in *Camp v. Herzog*, 104 F. Supp. 134 (1952, D. C. Dist. Col.), the Court struck down an order of the Board barring the plaintiff from practicing or appearing before the Board as attorney on the ground that, while the Board had power under the Act to suspend or exclude attorneys, the Board had nowhere prescribed any pertinent rule regulating the admission or disbarment of persons authorized to practice before it.

No Court other than the Court below has apparently passed upon the effect of Section 3(a) upon agency action based on proceedings which the agency was not attempting to require a party to take to protect his rights, but to which he was required to resort to attempt to defend those rights. (*Cf. Willow Farm Products Co. v. Brannan*, 90 F. Supp. 195 (N. D. Ill., 1950); *Woods v. Benson Hotel Corp.*, 75 F. Supp. 743 (D. Minn., 1948); *United States v. Morton Salt Co.*, 338 U. S. 632, 94 L. Ed. 401,

70 S. Ct. 357 (1950); *Kilgore National Bank v. Federal Petroleum Board,* 209 F. 2d 557 (C. A. 53 Cir., 1954); *Olin Industries v. National Labor Relations Board,* 72 F. Supp. 225 (D. Mass., 1947).)

In depriving an interpretative regulation of the great weight it would have been entitled to if it had been published as required by Section 3(a), the Court in *Woods v. Benson Hotel Corp.,* 75 F. Supp. 743, 748 (D. Minn., 1948) said "since the mandate of Section 3 is clear, direct and positive the only way it can be enforced is to say that acts of administrative bodies not conforming to Section 3 will not be recognized by the courts as official acts. . . ." This view is shared by a leading authority on the Administrative Procedure Act. (Schwartz The Administrative Procedure Act in Operation, 29 N. Y. Law Review 1173, at 1188.)

Both the House and Senate Committees stressed the importance of Section 3, the Senate Committee stating: "The public information requirements of Section 3 are in many ways the most important, far reaching and useful provisions of the (Act)." (Administrative Procedure Act, Legislative History, 198 (Sen. Doc. No. 248, 79th Cong. 2d Sess. 311 (1946) History 198) and the House Committee: "The public information section is basic, because it requires agencies to take the initiative in informing the public" (House Report No. 1980, May 3, 1946).

In view of the substantial importance placed upon this section by Congress, this Court should clarify the effect of a lack of compliance with Section 3(a) upon agency proceedings.

Conclusion.

The several questions involved in this case are fundamental questions in the administration of labor relations under the National Labor Relations Act.

The Court below has sanctioned the denial of Petitioner's constitutional right of free speech by the Board. It has condoned the Board in destroying the clearly expressed intention of Congress in four of the 1947 amendments to the Act. It has placed such actions of the Board beyond judicial review. A decision by this Court will resolve not one, but several, conflicts of decision between Courts of Appeals and contribute immeasurably to the future orderly administration of the Act by the Board.

We respectfully submit that the petition for certiorari should be granted.

George R. Richter, Jr.,
Counsel for Petitioner.

Roy Littlejohn,
Of Counsel.

APPENDIX.

United States Court of Appeals for the Ninth Circuit.

No. 13,894. July 30, 1954.

Foreman & Clark, Inc., a corporation, Petitioner, v. National Labor Relations Board, Respondent.

Petition for Review and Petition for Enforcement of Order of the National Labor Relations Board.

Before: Healy, Bone and Lemmon, Circuit Judges; Lemmon, Circuit Judge.

"The flattery of hope and the impressions of fear", referred to by common-law writers in connection with confessions,[1] can intrude themselves into labor relations as well.

The National Labor Relations Act, hereinafter referred to as the Act, protects the employee from "unfair labor practices", as defined by statute. Such practices include, by necessary implication, any "threat of reprisal or force or promise of benefit."[2]

But the power of the National Labor Relations Board, hereinafter referred to as the Board, is not limited to protecting the employee from such "unfair labor practices". It may also prevent "discriminatory use of company facilities (interfering) with the employees' freedom of choice in the selection of a bargaining representative".

It is our task to determine whether, in the light of the entire record in the instant case, Foreman & Clark, Inc., referred to herein as the Company, has thus interfered with its "employees' freedom of choice". In such determination, we must be guided by two working principles: (a) "The Board's findings are entitled to respect", because of the deference that should be paid to its "expertise" —a word of which Mr. Justice Frankfurter seems fond;[*] and (b) its findings "must nonetheless be set aside when the record before a Court of Appeals *clearly* precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both". (Emphasis supplied.)

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[1] Wigmore regards this phrase as a part of the "sentimental rhetoric . . . interpolated by editors into Gilbert's and Hawkins' treatises". See 3 Wigmore on Evidence, Third Edition, Sec. 818, Note 15, page 237.

[2] Cf. 29 USCA Sec. 158(c).

In striking a rational balance between these two considerations, it will not do for courts to give lip-service to the "expertise" of an administrative agency, and then scrutinize with a captious eye and weigh with an apothecary's scale every finding made by such an agency. If there is on the record considered as a whole actually substantial evidence to support the findings, they should be upheld and the resulting order should be enforced.

1. *Statement of The Case*

Since the Company has raised a number of procedural objections, a somewhat full outline of the proceedings before the Board will be helpful.

In Case No. 21-RC-1836, hereinafter referred to as No. 1836, a petition was filed with the Board on March 6, 1951, by Local 297, Amalgamated Clothing Workers of America, CIO, hereinafter referred to as the Union, seeking certification as representative of employees performing alterations in six of the Company's nine retail clothing stores in Southern California. On March 22, 1951, the petition was amended to cover employees performing alteration work in all of the aforesaid nine retail stores. Two of the stores are situated at 707 South Hill Street and 5657 Wilshire Boulevard, Los Angeles, and the other seven establishments are in Hollywood, Pomona, Huntington Park, Burbank, Long Beach, San Diego, and San Bernardino.

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[*] Universal Camera Corporation v. N.L.R.B., 1951, 340 U. S. 474, 488, 490; Far East Conference v. United States, 1952, 342 U.S. 570, 574-576.

The "unit" for which a "certification of representatives" was sought "included: All Tailor Shop employees, including Tailors, Bushelmen, Finishers, Operators, Rippers and Pressers". It excluded "All others, including watchmen, guards, professional employees and supervisors as defined in the . . . Act, as amended".

On May 28, 1951, a hearing was held at Los Angeles before a hearing officer of the Board. On August 31, 1951, the Board issued a "Decision and Order" dismissing the petition, one member dissenting. The decision recited that "the Employer agrees with the geographic scope of the proposed unit, (but) contends that an overall unit, including salesmen and will-call boys, in addition to those employees sought by the Petitioner (the Union), is the only appropriate unit." The majority decision found "no persuasive reason why the alteration shop employees should constitute a separate appropriate unit on a craft, professional or departmental basis," and that "No question affecting commerce exists concerning the representation of employees of the Employer, within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the (National Labor Relations) Act," *infra.*

On November 7, 1951, the Union filed a "Motion for Reconsideration" of the Board's decision of August 31, 1951. The Company on November 23, 1951, filed a "Reply Brief" in opposition to the motion for reconsideration.

On January 16, 1952, the Board issued its "Supplemental Decision and Direction of Election" setting aside its original Decision and Order of August 31, 1951, and containing a "Direction of Election" "by secret ballot . . . as early as possible, but not later than 30 days from the date of this Direction".

In this supplemental decision, the Board found that "The tailors, bushelmen-fitters, finishers, operators, rippers and pressers at the Employer's stores are all engaged in manual work, much of it highly skilled, which is easily differentiated from the duties of the selling personnel. Tailor shop employees are paid on a different basis than (*sic*) other employees and in one instance work at times when the remainder of the store is closed. They are separately located and in most instances the salesmen are under direction not to enter their work quarters".

The Board further found that the unit was not "inappropriate as a departmental grouping merely because a limited number of these employees do a small amount of work outside of the department". Finally, the Board found *"On the entire record"* that "the alteration employees constitute a basically highly skilled, distinct, and homogeneous departmental group which, in the absence of any past or present representation on a broader basis, constitutes a unit appropriate for the purposes of collective bargaining". (Emphasis supplied.)

On February 4, 1952, the Company filed a Motion to Stay Direction of Election, to Vacate Supplemental Decision, for Reconsideration, etc. The motion alleged that the Board's Supplemental Decision and Direction of Election of January 16, 1952, was filed without holding an additional hearing, without hearing any new evidence, and with "no opportunity . . . afforded to Foreman & Clark, Inc., to rebut by evidence the statements made in the motion for reconsideration". The Company's motion also complained that, while for all steps in this proceeding up to and including the Decision and Order of . . . August 31, 1951, the nature and requirements of the formal or informal procedures have been stated and published in the Federal Register by the Board, (f) or all subsequent steps in these proceedings, no statement of the nature or requirements of the formal or informal procedures available have been published by the Board in the Federal Register". The motion then quoted in part Section 3(a) of the Federal Administrative Procedure Act, 5 USCA Sec. 1002(a), providing that every agency shall publish in the Federal Register "statements of the general course and method by which its functions are channeled and determined, *including the nature and requirements of* all *formal or informal procedures available,*" etc. (Emphasis supplied in the Motion.)

On March 11, 1952, the Board denied the Company's motion to stay, etc. The election was held on April 4, 1952, by the employees in the Company's men's and women's alteration departments at the nine stores mentioned above. The Union lost by a vote of 18 to 17.

Four days later, the Union filed a letter of "formal protest" regarding the election, alleging that "management's representatives assembled the employees on the premises of the Company, during the working hours of such employees, and there made statements against the

Union, without the Union having the opportunity or the use of equal facilities to reply to management's distortions, half-truths, and falsehoods." The Board was requested to set aside the election.

On May 13, 1952, the Regional Director of the Board filed his report on the Union's objections. The report stated that the Company's president visited each of the nine affected stores and made an informal speech to the alteration department employees; that there was evidence that some of the employees knew a few days in advance that the president was going to visit them, but, the report added, the Union's representatives "deny that they knew of the speeches before the evening of April 3 (the day before the election)". Three of the speeches were made two days before the election, and six were made on the day before the election.

The report further recited that the eligible voters were called together in the alteration shop at each store to hear the president of the Company during working hours; that in general the employees had no alternative but to attend; that there was no evidence that the Company president made any statement to the employees which might be held to be coercive; that there was no showing that the Union requested the right to address the employees, or that any employees requested the privilege or attempted to rebut the president's statement; that no representative of the Union knew of these meetings until the last one had been held; that the timing of the president's speeches was such as to make impossible the holding of any further meetings for the purpose of giving the Union an opportunity to rebut his statements; that the Company in effect denied the Union such an opportunity, by timing the speeches as it did; and that by addressing the employees in small groups the Company may have interfered with the election.

The Regional Director closed his report by recommending that the Board set aside the election.

On May 22, 1952, the Company filed exceptions to the Regional Directors' report, requesting that the Board overrule the recommendations of the Regional Director and certify the results of the election. Counsel point out that the exceptions "did not deny that non-coercive and non-promising speeches had been made," but objected "to the report and recommendation of the Regional Director to set aside the election on the ground that, being based solely on the mere timing of a non-coercive speech, it would directly contravene Section 8(c) of the Act (*infra*) and the guaranty of freedom of speech in the First Amendment to the Constitution of the United States."

The exceptions concluded with the statement that if the Board believed that non-coercive and non-promising speeches to employees could be made the basis for setting aside an election—

"We submit that, in that event, a hearing would be necessary to determine the facts with reference to the opportunities available to Petitioner (the Union), and availed of by it, to make known its views to the employees."

On October 21, 1952, the Board issued a Supplemental Decision Order and Second Direction of Election, the Chairman dissenting. The majority agreed with the Regional Director's conclusion that by timing the speech "the Employer made impossible the holding of any further meetings before the election and thereby, in effect, denied the Union an opportunity to speak under comparable circumstances". The Decision continued:

"Taking into account the locations of the nine stores involved and the amount of time necessary to cover these distances, as evidenced by the time consumed by the Employer's own schedule in making his speeches, it is clear that the Employer by so timing his remarks precluded the possibility of the union being able to request and be given a similar opportunity to speak. By thus using the company time and property for electioneering speeches to employee assemblies while, in effect, denying the Union similar use, the Employer prevented the employees from hearing 'both sides of the story under circumstances which reasonably approximate equality.' This discriminatory use of company facilities interfered with the employees' freedom of choice in the selection of a bargaining representative."

The Board did point out, however, that there was no allegation "that the contents of the Employer's speeches went beyond the protection of 8(c) of the Act (29 USCA Sec. 158, *supra*)".

A "Second Direction of Election" was promulgated by the Board at the same time that it set aside the election of April 4, 1952.

On November 3, 1952, the Company filed a motion to vacate the supplemental decision and requesting that the Board "direct a hearing for the obtaining of evidence in the proper and legal manner".

On November 21, 1952, the Board denied the Company's motion to vacate the Supplemental Decision of October 21, 1952.

On January 9, 1953, or within twelve months of the purported election of April 4, 1952, a second election was held among the employees in the same unit in which the first election was held. The vote was 26 to 8 in favor of the Union.

Based on the results of this second election, a "Certification of Representatives" was issued by the Board on January 19, 1953, declaring the Union to be the exclusive representative of the employees in the unit.

In Case No. 21-CA-1621, the General Counsel for the Board, by the Regional Director for the Twenty-First Region, issued a complaint against the company, alleging that the latter "had refused to bargain collectively" with the Union and was "thereby engaging in unfair labor practices," etc.

After certain proceedings that need not be detailed here, on June 3, 1953, the Board rendered its Decision and Order, affirming its rulings, orders, etc., holding that its Certification of Representatives was not invalid, ordering the Company to cease and desist from refusing to bargain collectively with the Union, etc.

The case comes to this Court on the Company's Petition for Review of the Board's Decision and Order of June 3, 1953.

3. *Some Additional Facts.*

Most of the material facts in this case are disclosed in the pleadings and proceedings that have just been fully summarized. For a proper understanding of the case, however, a few supplemental facts should be stated and some nomenclature clarified.

In the first place, it should be noted that counsel for the Company announced: "The company makes no contention that if a unit of tailor shop employees should be found appropriate (as a unit for collective bargaining), . . . the unit should not include all of the nine stores which are listed in the Petition, nor all of the employees who are shown on the company's job classifications as listed in Board's Exhibit No. 2." Exhibit No. 2 was prepared in the office of the Board's Hearing Officer from the payroll listing of March 17, 1951.

The Company's position, however, is that the tailor shop employees do not constitute an appropriate unit in themselves. With respect to the classifications listed, counsel stated at the trial that "the tailor shop foreman and shop foreman" would be included under the Act, provided, of course, that the unit itself is found to be appropriate. In other words, there are no supervisory positions within the meaning of the Act listed on the payroll exhibit.

It is chiefly in connection with these foreman positions that some clarification of terminology is necessary. In the record here, the highest employee in the tailor shop in each of the nine stores is variously designated or described as "tailor shop foreman", "shop foreman", "leader", "leadman", and "bushelman-fitter".

Despite all these elaborate or high-sounding titles, it is the store manager in each of nine stores who "has the authority within his store".

The Company's own confusion and vagueness as to titles and positions is indicated by the testimony of Jackson A. Wilcox, the operating manager of the corporation.

Mr. Wilcox, who was the Company's sole witness, testified at great length regarding the tailor-shop positions at the nine stores.

After declaring that "the tailor shop foreman" or "shop foreman" at the Hollywood store was "one of the two men listed as tailor", and that the foreman at Pomona "is the man listed as tailor", Mr. Wilcox announced that "The tailor is a position which we no longer have with the company".

A few moments later, however, Mr. Jackson revived tailorships—at least in the Hollywood and Pomona stores:

"Tailors, with the exception of the one at Hollywood and the one at Pomona, are really bushelman-fitters."

And still later:

"The ladies' tailor at Hollywood, that is misnomer again. That should be ladies' alterations."

Finally:

"Q. At Huntington Park we have a man listed as men's alterations, and you say he does the same work at that store that the bushelman-fitter would do at Seventh and Hill?

"A. No, that isn't quite correct. The bushelman-fitter at Huntington Park is the—

"Q. No. 1 man?

"A. Yes, the man listed has men's alterations at Huntington Park—Correction. That isn't a man at all. It is a woman, and should be listed as an operator."

As we have seen, counsel for the Company stated in open court that his client made "no contention that if a unit of tailor shop employees should be found appropriate . . . the unit should not include . . . all of the employees who are shown on the company's job classifications as listed on Board's Exhibit No. 2". Yet in its opening brief, the Company devotes many pages to developing in detail and with specific instances its objection that "Employees performing alteration work also perform the same functions as other employees in the store." For instance, the brief specifies that "Of the forty-five employees who spend all or a part of their time on alteration work, 8 spend portions (up to 50%) of their time in actual selling, 11 are bushelmen-fitters who work with the salespeople on the selling floor," etc., etc.

In view of the Company's avowal in open court that it found no fault with the job classification in Exhibit 2, its subsequent caviling over the types of employment covered by that exhibit seems somewhat inconsistent.

Be that as it may, regardless of the fact that some of the employees in the tailor shop group also do a certain amount of work in other departments, the unit as a whole is distinctive and homogeneous. Mr. Wilcox himself testified that "A bushelman is one who can perform any tailoring operation on a man's garment". "Most of them are required and equipped to make a coat from start to finish". A fast learner "may become a good bushelman in three or four years' time". "Most of these men who qualify have been in the work most of their lives."

Then there are sewing machine operators, basters, finishers, seamstresses, the fitter at Burbank, pressers, etc.

Finally, the tailor-shop quarters are situated in a separate part of the store, generally adjacent to the will-call department, except in San Diego, where the tailor shop is in the penthouse on the roof. Occasionally the salesmen go into the tailor shop, but, according to Mr. Wilcox, "we try to keep them out of the tailor shop".

From the foregoing, it will be seen that the tailor-shop employees would bring problems to the bargaining table which would differ materially from the grievances of the other employees in the stores.

We are satisfied that there was substantial evidence to support the Board's unit determination.

4. *The Findings of the Board, If Supported by Substantial Evidence, Are "Conclusive".*

The Company has specified ten errors, all assertedly arising from the Board's violation "of its own rules and regulations", a denial of due process of law, an "arbitrary, capricious . . . abuse of discretion" or violations of the Act or of the Federal Administrative Procedure Act. The specification of errors is summarized[4] and the applicable statutes are copied[5] in the margin.

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[4] 1. The Board's holding that the first election was invalid solely because of a non-coercive and non-promising speech by the employer to eligible employees.

2. The directing and holding of a second election in the same bargaining unit in which a valid election had been held in the preceding twelve-month period.

3. The issuance of the Supplemental Decision, etc., of October 21, 1952, without holding a hearing on issues of fact.

4. The denial of the Company's requests for a hearing on issues of fact necessary to the Board's determination "made before and after" the above-mentioned "supplemental Decision was issued".

5. The setting aside of the Board's original order dismissing the representation proceedings and the issuance of the Supplemental Decision, etc., of January 16, 1952, where such action was based upon proceedings the nature and requirements of which were not published in the Federal Register in compliance with Section 3(a) of the Federal Administrative Procedure Act.

6. The basing of the Supplemental Decision and Direction of Election on facts not produced at the hearing and as to which no hearing had been held.

7. The denial of the Company's request for a hearing as to the facts on which the Board based its Supplemental Decision, etc., and as to which no hearing had been held.

8. The holding that a group of employees spending all or part of their time in performing alterations work, constitutes an appropriate unit, where the Board admittedly considered the extent of organization as a factor, etc.

9. The finding that on or after January 19, 1953, the Union was the collective bargaining representative of the employees in the alleged appropriate unit, since the only evidence to support such finding was the election of January 9, 1953, which was invalid under Section 9(c)(3) of the Act.

10. The Board's holding that the Company was guilty of an unfair labor practice within the meaning of Section 8(a)(5) or 8(a)(1) of the Act by refusing to bargain with the Union certified by the Board in such unit upon the basis of such proceedings.

[5] The Administrative Procedure Act:

5 USCA Cum. Supp.:

"Sec. 1002. **Publication of information, rules, opinions, orders and public records.**

"Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2)

We have already adumbrated the limits of this Court's power of review with reference to an order of the Board. In view of the Company's vigorous attacks upon the order in the instant case, however, it might be helpful to pursue the inquiry further.

In the first place, the mandate of the statute itself is unequivocal and peremptory: The Board's findings of

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any matter relating solely to the internal management of an agency —"(a) Every agency shall separately state and currently publish in the Federal Register . . . (2) Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; . . . No person shall in any manner be required to resort to organization or procedure not so published."

"Sec. 1009. **Judicial review of agency action.**

(e) . . . the reviewing court shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence. . . . In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

National Labor Relations Act:

29 USCA, 1953 Cumulative Annual Pocket Part:

"Sec. 158. **Unfair labor practices.**

"(a) It shall be an unfair labor practice for an employer—

"(1) To interefere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * *

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual fact, if supported by substantial evidence, *shall* be conclusive.

Secondly, on innumerable occasions the Supreme Court has emphasized the great weight that the judiciary should accord to the findings of administrative bodies, including the Board.

In the oft-quoted case of United States v. United States Gypsum Co., 1948, 333 U. S. 364, 395, the Court adverted to "the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury", citing with approval Corn Products Co. v. Federal Trade Commission, 1945, 324 U. S. 726, 739, and Labor Board v. Greyhound Lines, 1938, 303 U. S. 261, 268.

After quoting at length from United States Navigation Co. v. Cunard Steamship Co., 1932, 284 U. S. 474, 485, the

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form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

"Sec. 159. **Representatives and elections—Exclusive representatives; employees' adjustment of grievances directly with employer.**

* * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit aprpopriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: . . .

"(c)(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been had. . . .

"(c)(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling."

"Sec. 160. **Prevention of unfair labor practices—Powers of Board generally.**

* * *

"(e) . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . ."

Supreme Court, in Far East Conference v. United States, 1952, 342 U. S. 570, 574-575, continued:

"The Court thus applied a principle, *now firmly established,* that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the *limited functions of review by the judiciary* are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to *agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."* (Emphasis supplied.)

Indeed, the Supreme Court has attributed to administrative boards powers that approach the psychic. We are told that such bodies are not limited to tangible evidence that "may be grasped thus". Compared to courts, they are "better equipped . . . for weighing intangibles . . ." Federal Communications Commission v. RCA Communications, Inc., 1953, 346 U. S. 86, 96. They may even rely upon *intuition,* provided it is "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions,—*impressions which may lie beneath consciousness without losing their worth."* (Emphasis supplied.) Chicago, Burlington & Quincy Railway Company v. Babcock, 1907, 204 U. S. 585, 598, quoted in part and with approval in National Labor Relations Board v. Seven-Up Bottling Company of Miami, Inc., 1953, 344 U. S. 348.[*]

In the face of such massive authority, it is late in the day to scrutinize with a microscope the fact-findings of the Board. If, as here, they are supported by substantial evidence, they must stand.

5. *The Board's Determination of the Appropriateness of a Unit Will Not Be Set Aside Unless It Is "Arbitrary or Capricious."*

Great latitude is given to the Board in determining "the unit appropriate for the purposes of collective bargaining."

In Packard Motor Car Company v. National Labor Relations Board, 1947, 330 U. S. 485, 491, the Court used the following language:

"The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed."[7]

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[*] See also National Labor Relations Board v. Waterman Steamship Corporation, 1940, 309 U. S. 206, 208-209; National Labor Relations Board v. Link-Belt Company, 1941, 311 U. S. 584, 597; Phelps-Dodge Corporation v. National Labor Relations Board, 1941, 313 U. S. 177, 194; Security Administrator v. Quaker Oats Co., 1943, 318 U. S. 218, 227-228; National Labor Relations Board v. Southern Bell Telephone & Telegraph Co., 1943, 319 U. S. 50, 60; National Labor Relations Board v. Hearst Publications, Inc., 1944, 322 U. S. 111, 130-131; American Trucking Associations, Inc. v. United States, 1953, 344 U. S. 298, 310; National Labor Relations Board v. Lettie Lee, Inc., 9 Cir., 1944, 140 F. 2d 243, 247; Local Union No. 12, etc. v. National Labor Relations Board, 7 Cir., 1951, 189 F. 2d 1, 4, certiorari denied, 1951, 342 U. S. 868.

Some courts have stated the rule to be that the Board's determination of the appropriate unit for collective bargaining will not be disturbed unless it is clearly "arbitrary", "capricious", or "unreasonable". National Labor Relations Board v. Botany Worsted Mills, 3 Cir., 1943, 133 F. 2d 876, 880, certiorari denied, 1943, 319 U. S. 751-752; National Labor Relations Board v. Continental Oil Co., 10 Cir., 1950, 179 F. 2d 552, 554; National Labor Relations Board v. Grace Co., 8 Cir., 1950, 184 F. 2d 126, 129.

6. *The Board's Determination of the Unit Was Neither Arbitrary Nor Capricious.*

From our summary of the proceedings and the evidence, it will be seen that the tailor shop has been regarded by both employer and employees as an actual and not an artificial unit. As has already been pointed out, the Company, through its counsel, conceded to the Hearing Officer that if *any* tailor shop employees' unit was found to be appropriate, *all* the individual employees listed in the Union's proposed group should be included therein.

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[7] See also Pittsburgh Plate Glass Co. v. National Labor Relations Board, 1941, 313 U. S. 146, 152; National Labor Relations Board v. Hearst Publications, *supra*, 322 U. S. at page 134; May Department Stores Co. v. National Labor Relations Board, 1945, 326 U. S. 376, 380; National Labor Relations Board v. Lettie Lee, *supra*, 140 F. 2d at page 248; National Labor Relations Board v. Graham, 9 Cir., 1947, 159 F. 2d 787, 788; National Labor Relations Board v. National Plastic Products Co., 4 Cir., 1949, 175 F. 2d 755, 758; Mueller Brass Co. v. National Labor Relations Board, 1950, C. A. D. C., 180 F. 2d 402, 405; National Labor Relations Board v. Somerville Buick, Inc., 1 Cir., 1952, 194 F. 2d 56, 59.

To borrow the language of the Court in National Labor Relations Board v. Armour & Co., 10 Cir., 1946, 154 F. 2d 570, 573, certiorari denied, 1946, 329 U. S. 732, the tailor shop employees "are a cohesive group, allied as to their bargaining interests by the similarity of their functions and working conditions".

7. *The Board's Unit Determination Was Not Controlled by the Extent to Which the Employees Had Organized.*

Invoking Section 9(c)(5) of the Act (29 USCA Sec. 159(c)(5)), the Company specifies as error, *inter alia*, the fact that "the Board admittedly considered the extent of organization as a factor".

On its face, such a specified error does not disclose a valid cause of objection. The section in question proscribes only a unit determination in which "the extent to which the employees have organized" is *controlling*. The specified error fails so to state.

Quite aside from this technical defect, however, the record reveals that there is no merit to this objection. As has already been shown, the Board gave a number of specific and valid grounds for its determination that the proposed unit was appropriate, and made only passing mention of "the absence of any past or present representation on a broader basis". Indeed, the Board, in its Decision and Order of June 3, 1953—the ruling here attacked—specifically disclaims any such ground.

Even, however, if the extent to which the employees had organized had been a *contributing* reason for the Board's decision, the statute would not have been violated, so long as it was not the *controlling* one. National Labor Relations Board v. Salant & Salant, Inc., 6 Cir., 1948, 171 F. 2d 292, 293; National Labor Relations Board v. Local 404, etc., 1 Cir., 1953, 205 F. 2d 99, 103.

8. *An Employer Has Little if Any Voice or Interest in the Selection of His Employees' Bargaining Unit.*

One wonders precisely what interest this or any other employer actually has in the bargaining unit that is to represent his employees. His self-interest may cause him to object to unionism in general; but once that objection is proved to be futile, of what possible concern can it be to him whether Group A of his employees is represented by Local 1 or Local 100? Or, if an employer objects to unionization of any kind, why should he hold out for even a larger unit than the one desired by his employees? Why should an employer, willing to accept a larger, comprehensive unit, haggle over the membership of a smaller one? What's Hecuba to him, or he to Hecuba?

The courts have repeatedly recognized the incongruity of such a position. In National Labor Relations Board v. National Mineral Co., 7 Cir., 1943, 134 F. 2d 424, 426-427, certiorari denied, 1943, 320 U. S. 753, Judge (now Mr. Justice) Minton lucidly exposed the fallacy:

> "The employer's interest and his great concern about whom the employees shall have as their representative for bargaining purposes are easily demonstrated *as very unsubstantial.* Suppose the stockholders of the respondent company or any corporation were holding a stockholders' meeting for the purpose of electing the bargaining representative of the stockholders, namely, the directors; and suppose fraud, forgery and sharp dealing of many kinds were used in the procurement and handling of the stock-

holders' proxies in such an election. Would the employer be likely to tolerate the protest of its employees, who were not stockholders, that the election was crooked and invalid?" (Emphasis supplied.)[8]

By a parity of reasoning, the same argument applies to an employer's interest in the selection of his employees' bargaining *unit*. This point was brought out in National Labor Relations Board v. S. H. Kress & Co., 6 Cir., 1952, 194 F. 2d 444, 445, in the following language:

"There was nothing arbitrary or unreasonable in this selection of the unit for collective bargaining purposes. N.L.R.B. v. Grace Co., 8 Cir., 184 F. 2d 126, 129 (*supra*). However, respondent (company) objected thereto and commenced and constantly kept up a series of objections and exceptions to almost every step taken by the Board in further proceedings. This is true, notwithstanding *nothing more was involved than collective bargaining procedure in which respondent had no voice.*" (Emphasis supplied.)

9. *There Is "Great Latitude" Accorded to the Board Both as to Remedies and as to Procedure—Including the Holding of Hearings—Relating to Elections and Other Matters.*

The Company complains of the Board's setting aside the first election, "restraint" of *the Company's* freedom of speech, "violation" of the Federal Administrative Procedure Act, denials of hearings, "violations" of the Board's own rules and regulations, etc. Certain of these objections, all of which relate to the Board's power to control election proceedings and other matters brought before it, will be discussed together, while others will be treated under separate headings.

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[8] See also National Labor Relations Board v. Kentucky Utilities Co., 6 Cir., 1950, 182 F. 2d 810, 812-813.

The wide leeway that both Congress and the courts have accorded to the Board and to other administrative agencies has been given frequent judicial recognition.

The leading case of Inland Empire Council v. Millis, 1945, 325 U. S. 697, 706-707, was decided before the amendment to 29 USCA Sec. 159 (c), which now reads in part as follows:

"... the Board shall *investigate* such petition (for collective bargaining representation) and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall provide for an appropriate hearing upon due notice*. ... If the Board finds upon the record of such hearing that such a question of representation exists, it *shall direct an election by secret ballot* and shall certify the results thereof."

We have italicized those portions of Sec. 159(c)(1)(B), as amended, that render pertinent to the case at bar the following observations of the Court in the *Inland Empire Council* opinion, *supra*:

"The section is short. Its terms are broad and general. Its only requirements concerning the hearing are three. It must be 'upon due notice', it must be 'appropriate', and it is mandatory 'in any such investigation', . . .

"Obviously great latitude concerning procedural details is contemplated. *Requirement of formality and rigidity are altogether lacking*. The notice must be 'due', the hearing 'appropriate'. These requirements are related to the character of the proceeding of which the hearing is only a part. *That proceeding is not technical. It is an 'investigation', essentially informal, not adversary.* The investigation is not required to take any particular form or confined to the hearing. The hearing is mandatory—'the Board *shall* provide for' it. But the requirement is only that it shall be provided, 'in any such investigation'. *The statute does not purport to specify when or at what stage of the investigation the hearing shall be had. . . .*" (Emphasis supplied.)

There is specified as error that the Board was wrong in relying upon facts "not produced at the hearing and as to which no hearing had been held". A similar objection was thus answered in the *Seven-Up Bottling Company case, supra,* 344 U. S. at pages 348-349:

"It is urged, however, that no evidence in this record supports this back pay order; that the Board's formula and the reasons it assigned for adopting it do not rest on data which the Board has derived in the course of the proceedings before us. But in devising a remedy *the Board is not confined to the record of a particular proceeding.* 'Cumulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, *differentiates perhaps more than anything else the administrative from the judicial process.* '(T)he relation of remedy to policy is peculiarly a matter for administrative competence. . . .' *Phelps Dodge Corp. v. Labor Board, supra,* 313 U. S., at 194. That competence could not be exercised if in fashioning remedies the administrative agency were restricted to considering only what was before it in a single proceeding." (Emphasis supplied.)

Furthermore, "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." Opp Cotton Mills, Inc. v. Administrator, 1941, 312 U. S. 126, 152-153; Ewing v. Mytinger & Casselberry, Inc., 1950, 339 U. S. 594, 598.

Finally, we need consider only briefly the Company's contention that "the Board's conclusion that the first election was invalid because of the non-coercive and non-promising speech made on behalf of Foreman & Clark", "was in violation of the guaranty of freedom of speech in the First Amendment."

As we have already seen, representation proceedings are "essentially informal, not adversary". Inland Empire Council v. Millis, *supra,* 325 U. S. at page 706. They are "not even litigation, but investigation." National Labor Relations Board v. Botany Worsted Mills, *supra,* 133 F. 2d at page 882.

There was no interference with the Company's freedom of speech in this proceeding.

10. *A Particularly Free Hand Is Given to the Board in the Conduct of Elections for Bargaining Representatives.*

The control of elections resides in the Board alone. National Labor Relations Board v. Waterman Steamship Corp., *supra,* 309 U. S. at page 226.

In National Labor Relations Board v. Howell Chevrolet Co., 9 Cir., 1953, 204 F. 2d 79, 86, affirmed, 1953, 346 U. S. 482, in which the Board *set aside* an election, this Court said:

"The processing of a representation petition, however, is a matter in which the decisions to be made relate to policies which Congress has in general committed to the discretion of the Board."

After adverting to the fact that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees," the Supreme Court, in National Labor Relations Board v. A. J. Tower Co., 1946, 329 U. S. 324, 330-331, noted an important qualification and an equally important counter-qualification to the rule:

"In carrying out this task, of course, the Board must act so as to give effect to the principle of majority rule set forth in Sec. 9(a), a rule that 'is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions.' * * *

"The principle of majority rule, however, does not foreclose practical adjustments designed to protect the election machinery from the ever-present dangers of abuse and fraud. Indeed, unless such adjustments are made, the democratic process may be perverted and the election may fail to reflect the will of the majority of the electorate." (Emphasis supplied.)[*]

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[*] See also National Labor Relations Board v. National Plastic Products Co., *supra*, 175 F. 2d at page 758; National Labor Relations Board v. S. H. Kress & Co., *supra*, 194 F. 2d at page 446; National Labor Relations Board v. Huntsville Mfg. Co., 5 Cir., 1953, 203 F. 2d 430, 434; Kearney & Trecker Corp. v. National Labor Relations Board, 7 Cir., 1954, 210 F. 2d 852, 858; National Labor Relations Board v. National Container Corp., 2 Cir., 1954, 211 F. 2d 525, 532.

11. *"The Board Is Not the Slave of Its Rules."*

The Company complains that the Board's position is as follows:

"That although its decision to set aside the first election was made solely on the theory of its own 'Bonwit Teller' doctrine, *which has since been repudiated by the Board itself,* its decision to set aside the first election should be sustained under its new 'Peerless Plywood' doctrine despite the fact that there are no facts in the record before this Court sufficient to warrant any finding based upon the Peerless Plywood doctrine," etc.

We will not attempt to analyze the Company's reasoning on this subject, since we regard it completely irrelevant to the problem now before us.

We are not here concerned with the "Bonwit Teller" doctrine, or the "Peerless Plywood" Doctrine, or the "Livingston Shirt Corp." doctrine, which is a third rule of the Board discussed in the briefs.

The question with which we *are* here concerned is this, and only this: Is the Board's Decision and Order of June 3, 1953, to be enforced, in the light of the applicable statutes and *judicial* decisions thereunder?

The Board need not be haunted by that "foolish consistency" which "is the hobgoblin of little minds".

In Securities & Exchange Commission v. Chenery Corporation, 1947, 332 U. S. 194, 202-203, the Court thus discussed the question:

"In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a *case-to-case basis* if the administrative process is to be effective. There is thus a very definite place *for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.* (Case cited.)" (Emphasis supplied.)

As was succinctly stated by Judge Medina in National Labor Relations Board v. National Container Corporation, *supra,* 211 F. 2d at page 534:

"The Board is not the slave of its rules."[10]

12. *The Board's Right to Reconsider Its Original Decision of January 16, 1952, Did Not Depend Upon Any Provision in Its Rules and Regulations.*

The Company objects that the Board's Supplemental Decision and Direction of Election on January 16, 1952, "was contrary to Section 3(a) of the Federal Administrative Procedure Act", *supra,* in that "no statements of the nature or requirements of the formal or informal procedures available have been published by the Board in the Federal Register". In other words, the complaint is that "the Board's order of January 16, 1952, (was) founded upon proceedings taken without compliance with the applicable provisions of the Federal Administrative Procedure Act."

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[10] See also National Labor Relations Board v. Cuy F. Atkinson Co., 9 Cir., 1952, 195 F. 2d 141, 148-149; Kearney & Trecker Corp. v. National Labor Relations Board, *supra,* 210 F. 2d 852, 857.

There is no merit to this contention. The clear purpose of Section 3(a), *supra*, is to provide a *shield* for a petitioner before the Board, or other agency, to protect him from being penalized for failing to resort to unpublished methods of procedure. It is not a *sword* by which a petitioner can strike down the agency's order, on the ground that the agency *has not authorised itself* to issue that type of order, by publishing a statement in the Federal Register!

Conclusion

As we have already pointed out, the Board does not claim "that the contents of the Employer's speeches went beyond the protection of Section 8(c) of the Act, (29 USCA Sec. 158(c)) which refers to permissible expressions of views.

Under the facts of this case, however, viewed in the light of the decisions applicable thereto, we agree with the Board's determination that the tailor-shop employees constitute an appropriate bargaining unit, and with its decision to set aside the first election because of the Company's last minute campaign speeches during working hours, under the circumstances already detailed. The latter decision was a proper exercise of the Board's "wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees". National Labor Relations Board v. A. J. Tower Co., *supra,* 329 U. S at page 330.

After a careful study of the evidence in the instant case, we are convinced that there is ample substantial evidentiary support on the record considered as a whole for the Decision and Order of June 3, 1953.

Accordingly, the petition for review and to set aside the decision and order of the Board of June 3, 1953, is hereby denied, and the prayer of the Board for a judgment enforcing in whole the said order of the Board is hereby granted.

(Endorsed:) Opinion. Filed July 30, 1954.

Paul P. O'Brien, Clerk.

Decree Enforcing an Order of the National Labor Relations Board.

In the United States Court of Appeals for the Ninth Circuit.

Foreman & Clark, Inc., Petitioner, vs. National Labor Relations Board, Respondent.

DECREE ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Before: Healy, Bone and Lemmon, Circuit Judges.

This cause came on to be heard upon the petition of Foreman & Clark, Inc., to review and set aside the Order of the National Labor Relations Board, dated June 3, 1953, and upon cross-petition of the Board to enforce said Order. The Court heard argument of respective counsel on May 26, 1954, and has considered the briefs and the transcript of record filed in this cause. On July 30, 1954, the Court, being fully advised in the premises, handed down its decision enforcing the said Order. In conformity therewith, it is hereby

Ordered, Adjudged, and Decreed that the Petitioner, Foreman & Clark, Inc., and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Amalgamated Clothing Workers of America, C.I.O., Local 297, as the exclusive representative of all employees in the men's and women's alteration departments at the Respondent's Los Angeles, Long Beach, Hollywood, Huntington Park, San

Diego, Pomona, Burbank, and San Bernardino, California, retail establishments, including tailors, bushelmen-fitters, finishers, operators, rippers, and pressers, excluding all supervisors within the meaning of the National Labor Relations Act, as amended, hereinafter called the Act;

(b) In any manner interfering with the efforts of Amalgamated Clothing Workers of America, C.I.O., Local 297 to bargain collectively with it in behalf of the employees in the aforesaid appropriate unit.

2. Take the following affirmative action which the National Labor Relations Board has found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Amalgamated Clothing Workers of America, C.I.O., Local 297, as the exclusive representative of all employees in the aforesaid appropriate unit with respect to wages, rates of pay, hours of employment, or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Post at each of its retail establishments in Los Angeles, Long Beach, Hollywood, Huntington Park, San Diego, Pomona, Burbank and San Bernardino, California, copies of the notice attached hereto and marked Appendix A. Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Twenty-first Region, Los Angeles, California, shall, after being signed by the Respondent's representative be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicious places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the aforesaid Regional Director for the Twenty-first Region, in writing, within ten (10) days from the date of this Decree, what steps the Respondent has taken to comply herewith.

Endorsed. Decree Filed and Entered September 7, 1954.
Paul P. O'Brien, Clerk.

APPENDIX A.

Notice to All Employees.

Pursuant to a Decree of the United States Court of Appeals Enforcing an Order.

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

> We Will Bargain collectively upon request with Amalgamated Clothing Workers of America, C.I.O., Local 297, as the exclusive representative of all employees in the bargaining unit described below with respect to wages, rates of pay, hours of employment, or other terms or conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:
>
> > All employees in the men's and women's alteration departments at the Respondent's Los Angeles, Long Beach, Hollywood, Huntington Park, San Diego, Pomona, Burbank, and San Bernardino, California, retail establishments, including tailors, bushelmen-fitters, finishers, operators, rippers, and pressers, excluding all supervisors within the meaning of the Act.
>
> We Will Not in any manner interfere with the efforts of the above-named Union to bargain collectively with us, or refuse to bargain with said Union as the exclusive representative of the employees in the bargaining unit set forth above.

Foreman & Clark, Inc.
(Employer)

Dated .... By ....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date hereof, and must not be altered, defaced, or covered by any other material.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 389

FOREMAN & CLARK, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. pp. 1-29)[1] is not yet reported. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding here under review (R. 321-333) is reported at 105 NLRB 333. The several decisions and orders of the Board entered in the representation proceeding (R. 133-139, 93-98, 52-56, 8-13), upon which the decision and order in the unfair labor practice proceeding is based in part, are reported at 101 NLRB 40, 98 NLRB 530, 97 NLRB 1080, and 95 NLRB 1504.

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[1] The designation "Pet. App." refers to the Appendix to the Petition.

JURISDICTION

The decree of the court below was entered on September 7, 1954 (Pet. App. p. 32). The petition for a writ of certiorari was filed on October 6, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 8(c) of the National Labor Relations Act, as amended, or the First Amendment precluded the Board from setting aside a representation election on the basis of petitioner's pre-election speeches, which were so timed as to deny the union an opportunity to reply under comparable circumstances.

2. Whether the Board's finding that petitioner's tailor shop employees constituted an appropriate unit for purposes of collective bargaining is supported by substantial evidence on the record as a whole.

3. Whether the Board in ruling on objections to a representation election properly refused to hold a hearing to permit petitioner to adduce additional evidence where the material facts were undisputed and already before the Board.

4. Whether, in the circumstances of this case,

the Board, having held an appropriate hearing in a representation proceeding and issued its decision, could, upon motion of one of the parties, properly reconsider its decision without holding another formal hearing.

5. Whether the Administrative Procedure Act precluded the Board from entertaining the motion for reconsideration of its decision in the absence of any specific provision for such reconsideration in its published rules and regulations.

STATUTES INVOLVED

The pertinent provisions of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001 *et seq.*), are set forth in the Petition, pp. 5, 8-9. The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*), in addition to those set forth in the Petition (pp. 5-8), are set forth in the Appendix, *infra,* pp. 23-25.

STATEMENT

I. The Board's findings of fact and conclusions of law

Upon the usual proceedings under Section 10 of the National Labor Relations Act, as amended, the Board, on June 3, 1953, issued its findings of fact, conclusions of law, and order. The Board found (R. 321-330) that petitioner had violated Section 8(a)(5) and (1) of the Act on and after February 25, 1953, by its admitted refusal to bargain collectively with the Amalgamated Clothing Workers of America, C.I.O., Local 297 (herein called the

Union), which had been certified by the Board, following a Board-conducted election, as the bargaining representative of tailor shop employees in an appropriate unit in petitioner's southern California stores. In defense of its refusal to bargain petitioner challenged (1) the appropriateness of the bargaining unit found by the Board and (2) the validity in other respects of the Board's "Certification of Representatives" in the underlying representation proceeding. The pertinent facts with respect to these defenses, which the Board rejected, are as follows:

A. *The appropriate unit.*—In March 1951, the Union, pursuant to Section 9(c)(1) of the Act, filed a petition with the Board to determine the bargaining representative of employees in petitioner's nine retail clothing stores in southern California (R. 1-5). The collective bargaining unit proposed by the Union as appropriate consisted of all tailor shop employees in these stores, including tailors, bushelmen, finishers, operators, rippers, and pressers, but excluding supervisors as defined by the Act (R. 8; 4). At a subsequent hearing on the petition in May 1951, petitioner agreed with the geographic scope of this proposed unit, but took the position that the unit should comprise salesmen and other employees in addition to the tailor shop employees (R. 8-9; 168-169). Petitioner further stated that it had no objection to the inclusion of tailor shop employees who also performed other work if the Board found the tailor shop unit itself appropriate (R. 168, 257-258, 7). On August 31, 1951, a divided panel of the Board issued a Decision and Order dismissing the petition on the ground that the tailor shop employees alone were not an appropriate unit (R. 8-13). 95 NLRB 1504.

Following a motion for reconsideration filed by the Union on November 9, 1951 (R. 14-30), and a reply brief in opposition filed by the Company on November 23 (R. 31-52), the Board on January 16, 1952, issued a Supplemental Decision and Direction of Election (R. 52-56). 97 NLRB 1080. Upon reconsideration of the entire record the Board found that: "The tailors, bushelmen-fitters, finishers, operators, rippers and pressers * * * are all engaged in manual work, much of it highly skilled, which is easily differentiated from the duties of the selling personnel [R. 53; 181-182, 215-225, 226-231, 257-258]. Tailor shop employees are paid on a different basis [from] other employees and in one instance work at times when the remainder of the store is closed [R. 53-54; 230, 196-197, 199, 204, 228-229]. They are separately located and in most instances the salesmen are under direction not to enter their quarters [R. 54; 178, 230-231, 177, 184]." In the light of these facts, the Board noted, the tailor shop unit is not inappropriate because a limited number of employees do some work outside the tailor shop (R. 54). Therefore, having found in its Supplemental Decision that the tailor shop employees are a "basically highly skilled, distinct, and homogeneous departmental group which, in the absence of any past or present representation on a broader basis, constitutes a unit appropriate for the purposes of collective bargaining," the Board set aside its original Decision and Order and directed that an election be held (R. 55-56).[2]

Thereafter, on February 4, 1952, petitioner filed a motion to stay the Direction of Election, to vacate the Supplemental Decision, for reconsideration, rehearing and oral argument (R. 57-93). In its motion petitioner asserted (1) that the Board, contrary to the Act, had found the tailor shop unit appropriate solely upon the basis of extent of organization; (2) that the Board had erroneously found that the tailor shop employees were a highly skilled, distinct and homogeneous departmental group so as to constitute an appropriate unit for purposes of collective bargaining; (3) that the Board had violated Section 3(a)(2) of the Administrative Procedure Act by entertaining the Union's motion for reconsideration because the Board's Rules and Regulations make no specific provision for reconsideration of a decision; and (4) that the Supplemental Decision contained certain misstatements of fact. The Board in another Supplemental Decision (March 11, 1952) stated that it had carefully considered petitioner's first two points when it rendered its earlier Supplemental Decision, and now reaffirmed its previous findings (R. 94-95). 98 NLRB 530. With respect to petitioner's third point, the Board noted that petitioner had raised no such objection in its reply brief in opposition to the Union's motion for reconsideration (R. 95; 31-52), and that, in any event, a motion for reconsideration is not the type of procedure which falls within the contemplation of Section 3(a)(2) of the Administrative Procedure Act (R. 95-96). Finally, as to point four, the Board, upon reexamination of the record, agreed with petitioner that footnote 4 of the Board's Supplemental Decision and Direction of Election was partially inaccurate, and corrected the error (R. 96-97; 54).[3] The Board concluded (R. 97), however, that the error did not alter its basic findings or warrant reversal of the Direction of Election.[4]

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[2] None of the employees in petitioner's southern California stores has previously been represented by a union (R. 53). However, in its Kansas City, Seattle, San Francisco, Oakland, and Sacramento stores petitioner in association-wide bargaining has voluntarily recognized separate bargaining units composed of tailor shop employees only (R. 206-212, 234-236, 252-254). This is consistent not only with the practice in other retail clothing establishments, but also with the Union's membership requirements, for the Union—popularly known as the "Bushelmen's Local"—admits only tailor shop employees (R. 269-274).

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[3] Contrary to a statement in the footnote that none of the tailor shop employees performed a majority of his work outside the department, the Board found that one and possibly two of the pressers spent a major portion of the working day doing janitorial work (R. 97, 54; 189-190; 193-194). These pressers worked in two of petitioner's smaller stores where neither the pressing nor the janitorial work was of sufficient volume to require the services of a full-time man (R. 223, 190-191).

[4] Concluding that the briefs and the record adequately set forth the issues, the facts material thereto, and the positions of the parties, the Board denied petitioner's request for oral argument or a rehearing (R. 98, n. 6).

B. *The validity of the certification.*—When the election was finally held on April 4, 1952, the Union lost by a vote of 18 to 17, and four days later filed objections protesting that petitioner had interfered with the election by election-eve speeches (R. 133; 103-105). Following an investigation of the issues raised by the objections, the Regional Director on May 13 issued a report in which he recommended that the Board set aside the election (R. 133-134; 105-109). The report stated that on April 2 and 3, immediately preceding the election, petitioner's president had visited each of its nine stores and addressed the tailor shop employees during working hours (R. 107-108). The content of the speeches was noncoercive, but anti-union. Although some of the employees may have known in advance that petitioner's president was going to visit them, the Union did not learn about the speeches until the evening of April 3 (R. 107, 134). The election the next day was conducted at each of the nine stores, which are up to 125 miles apart (R. 101-102, 107, 133, 265-266, 346).

Thereafter, on May 22 petitioner filed exceptions to the Regional Director's report, requesting that the Board overrule the recommendations of the Regional Director on the objections and certify the results of the election (R. 109-133). Petitioner specifically stated that it did not except to the facts as recited in the Director's report (R. 111, 110, 132), but claimed that these facts were insufficient to justify setting the election aside because the speeches were within the protection of the First Amendment and Section 8(c) of the Act; that, in any event, the Union had not asked petitioner for an opportunity to reply under similar circumstances; and, further, that there was no showing that the Union had not had ample opportunities to present its views to the employees at union and organizational meetings and at the homes of the employees (R. 110-111, 132).

The Board on October 21, 1952, issued a Supplemental Decision, Order, and Second Direction of Election (R. 133-139). 101 NLRB 40. Upon the basis of the undisputed facts, the Board in its Supplemental Decision found (R. 135) that petitioner had not gone beyond the protection of Section 8(c) of the Act in the content of the pre-election speeches. However, the Board concluded (R. 135) that the last-minute timing of these speeches to the assembled employees on company time and property, making it impossible for the Union to speak under comparable circumstances, had interfered with the employees' freedom of choice in the election.[5] The Board accordingly concluded that the

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[5] The Board reasoned that the timing of petitioner's speeches "made impossible the holding of any further meetings before the election and thereby, in effect, denied the Union an opportunity to speak under comparable circumstances. Taking into account the locations of the nine stores involved and the amount of time necessary to cover these distances, as evidenced by the time consumed by the Employer's own schedule in making his speeches it is clear that the Employer by so timing his remarks precluded the possibility of the Union being able to request and be given a similar opportunity to speak. By thus using the company time and property for electioneering

April 4 election was invalid, ordered it set aside, and directed a new election (R. 137-138).

Petitioner thereupon (November 3, 1952) filed a motion to vacate the second direction of election and sought a hearing (R. 139-156). In addition to arguing that its conduct did not constitute interference which warranted setting aside the election, petitioner asserted (1) that the Board should not have assumed the facts were undisputed because petitioner did not take exception to them, (2) that the Board therefore should not have directed the election without holding a hearing, and (3) that the eligibility date of the April 4 election was no longer appropriate. Following two Union memoranda in opposition to the motion, the Board on November 21, 1952, issued an order denying the motion and amending the second direction of election by changing the eligibility date (R. 156-159).[6] The Board concluded that by not excepting to the findings of fact in the Regional Director's Report,

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speeches to employee assemblies while, in effect, denying the Union similar use, the Employer prevented the employees from hearing 'both sides of the story under circumstances which reasonably approximate equality.' This discriminatory use of company facilities interfered with the employees' freedom of choice in the selection of a bargaining representative." (R. 135; footnote omitted.)

[6] Under the Board's second direction of election the employees eligible to vote were those who were employed during the payroll period immediately preceding the April 4 election (R. 137). The Board amended this eligibility date and provided that the employees eligible to vote in the second election were to be those employed during the payroll period immediately preceding the date of its second direction of election (R. 158-159).

petitioner had failed to raise any factual issue which required a hearing.[7] The Board also stated that evidence as to whether the Union had had opportunity to rebut petitioner's statements through Union meetings or visits to the employees' homes was not material, because in the Board's view, based on its experience in conducting elections, such means are not the equivalent of electioneering speeches on company property during working hours (R. 157-158, n. 2).

The Union won the second election held on January 9, 1953, by a vote of 26 to 8 (R. 159-160). Accordingly, the Board on January 19, 1953, certified the Union as the exclusive representative of all employees in the appropriate unit in petitioner's southern California stores (R. 160-161). Thereafter, petitioner refused to honor the certification.

II. The Board's order

The Board's order requires petitioner to cease and desist from refusing to bargain collectively with the Union, and from in any manner interfering with the efforts of the Union to bargain on behalf of the employees in the unit found appropriate by the Board. Affirmatively, the Board ordered petitioner to bargain collectively with the Union upon request and to post appropriate notices. (R. 330-333.)

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[7] The Board noted that although the Company now questioned the accuracy of certain previously unchallenged facts, it did not indicate that it had any evidence or knowledge of facts contrary to those reported by the Regional Director (R. 157).

III. The decision of the court below

The court below sustained the findings and order of the Board. The court held that the Board's unit determination was a reasonable exercise of its discretion to determine appropriate bargaining units and rejected petitioner's contention that the Board had, in determining the appropriateness of the unit, given controlling effect to the extent to which the employees had been organized, in violation of Section 9(c)(5) of the Act (Pet. App. pp. 12-20). The court further held that Section 3(a) of the Administrative Procedure Act did not preclude the Board from reconsidering its original Decision and Order in the representation proceeding (Pet. App. pp. 27-28). In sustaining the validity of the "Certification of Representatives," the court held that the Board's decision to set aside the first election because of petitioner's last-minute campaign speeches during working hours was a "proper exercise of the Board's 'wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees' " (Pet. App. pp. 28-29, 24-27). The court also rejected the contentions that the Board's action in setting aside the election abridged petitioner's right of free speech under Section 8(c) or the First Amendment and that the Board's failure to accord it a formal hearing on the objections to the election constituted a denial of due process (Pet. App. pp. 21-24).

ARGUMENT

1. Petitioner's main contention (Pet. 16-21, 23-29) is that Section 8(c) of the National Labor Relations Act and the First Amendment precluded the Board from setting aside the first election on the basis of petitioner's pre-election campaign speeches. The argument, which rests upon a misreading of both Section 8(c) and the First Amendment, overlooks the decisive fact that the Board, when it ordered a new election, was not penalizing petitioner for the speeches, but was simply discharging its duty "to insure the fair and free choice of bargaining representatives by employees." *National Labor Relations Board* v. *Tower Co.,* 329 U.S. 324, 330. It was petitioner's refusal to abide by the results of the second election (results which petitioner nowhere questions as representing anything but the free and informed views of the employees), and not the speeches before the first election, which formed the basis for the Board's remedial order.

Section 8(c) provides only that "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an *unfair labor practice* under any of the provisions of this Act, if such expression contains no threats of reprisal or force or promise of benefit" (emphasis added). The legislative history confirms what is apparent on the face of the section, namely, that it was intended only to preclude the Board from "predicat[ing] any finding of *unfair labor practice* upon" speech which contained no threats of reprisal or promise of benefit (emphasis added). S. Rept. No. 105, 80th Cong., 1st Sess., pp. 23-24. See also H. Rept. No. 245, 80th Cong., 1st Sess., p. 45. Indeed, Congress has specifically rejected an amendment to the Act which would have enlarged the scope of Section 8(c) and would have prohibited the Board from setting aside an election on the basis of speech which contained neither threats of reprisal nor promises of benefit. S. 249, 81st Cong., 1st Sess; 95 Cong. Rec. 583, 8713.[8] Here, the Board did not find that petitioner's election-eve speeches were an unfair labor practice, nor did it base any unfair labor practice finding upon them. The Board simply concluded that the last-minute timing of the speeches, and the consequent denial of a comparable opportunity to the Union to reply, prevented a free and fair election. And it ordered a new election to make certain that the employees' votes would reflect fully-informed judgments on the issues as presented by both sides. Since, therefore, the Board did not "predicate any finding of unfair labor practice upon" petitioner's speeches, Section 8(c), as its wording and history attest, has no relevance here.

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[8] The amendment was offered after the Joint Committee on Labor Management Relations, established by Congress to study the operation of the amended Act, reported that the Board had interpreted Section 8(c) "not [to] require it to consider as privileged non-coercive statements of an employer in a pre-election atmosphere when the Board is considering objections to the conduct of a representation election." S. Rept. No. 986, 80th Cong., 2d Sess., Part 3, pp. 54-55.

As the Board stated (R. 136), the vice in the instant case which prompted it to set aside the first election was not "the contents of [petitioner's] speeches" but rather "the denial to the union of the similar opportunity to speak at all." Thus, the basis of the Board's decision is not that the petitioner exceeded the permissible limits of free speech; on the contrary, as the Board pointed out (R. 135), there was "no allegation that the contents of the [petitioner's] speeches went beyond the protection of 8(c) of the Act." The Board held only that, in the circumstances of this case, petitioner's speeches were so timed as to constitute a "discriminatory use of company facilities" which "interfered with the employees' freedom of choice in the selection of a bargaining representative," and warranted setting aside the election. The fact that the Board ordered a new election is in no meaningful sense an invasion of petitioner's acknowledged right of free speech.

There is no merit in the claim of conflict between the decision below and the decisions of the Second and Sixth Circuits invoked by petitioner on the issue of employer free speech. *Bonwit Teller* v. *National Labor Relations Board,* 197 F. 2d 640 (C.A. 2), certiorari denied, 345 U.S. 905; *National Labor Relations Board* v. *American Tube Bending Co., Inc.,* 205 F. 2d 45 (C.A. 2); *National Labor Relations Board* v. *F. W. Woolworth Co.,* 214 F. 2d 78 (C.A. 6). Those cases, unlike the instant case, dealt with the question whether, in view of Section 8(c), an employer's pre-election speeches under conditions analogous to those involved here constituted unfair labor practices. As we have demonstrated, the considerations which underlie the resolution of that issue have no application here. In none of the three cases did the court of appeals purport to pass upon the question presented here—that is, whether the Board may properly set aside an election upon the basis of an employer's conduct similar to that of petitioner. Indeed, the Second Circuit in the *Bonwit Teller* case, *supra,* 197 F. 2d at p. 642, n. 1, specifically noted that it did not have that question before it.

2. Petitioner is also mistaken in the claim (Pet. 21-23) that the decision below conflicts with *National Labor Relations Board* v. *National Gas Co.,* 215 F. 2d 160 (C. A. 8). In that case the court refused enforcement of a Board order where the Board had modified its pertinent jurisdictional criteria and, in the court's view, had "expressly overruled" its own decision in the particular case before the court. No comparable situation is presented here. The Board adheres to the position that last-minute electioneering speeches made on the employer's premises during working time may, as in this case, interfere with the expression of a free choice at the polls and require the ordering of a new election. The Board has, it is true, modified its so-called *Bonwit Teller* rule under which an employer who made such speeches and refused to give the union a comparable opportunity to address the employees was deemed to have committed an unfair

labor practice. *Peerless Plywood,* 107 NLRB No. 106; *Livingston Shirt Corporation,* 107 NLRB No. 109.[9] But, as we have stressed, this former rule as to unfair labor practices is not involved here. The important fact remains that in the very cases modifying that rule, the Board reaffirmed the principle governing here—that last-minute pre-election speeches like petitioner's made on the employer's premises during working hours tend to prevent a fair election because the party who in this manner obtains "the last most telling word" gains an "unfair advantage" (*Peerless Plywood, supra*).[10]

3. Petitioner contends (Pet. 30-38) that the court below misapprehended and misapplied the controlling standard of review in affirming the Board's unit determination. There is no foundation for this claim. It is settled that a Board determination as to the appropriateness of a collec-

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[9] The Board thus summed up its modified rule in the *Livingston Shirt* case: "We rule therefore that, in the absence of either an unlawful broad no-solicitation rule (prohibiting union access to company premises on other than working time) or a privileged no-solicitation rule (broad, but not unlawful because of the character of the business) an employer does not commit an unfair labor practice if he makes a pre-election speech on company time and premises to his employees and denies the union's request for an opportunity to reply."

[10] In the *Peerless Plywood* case, the Board adopted the rule that in the future it would not permit either employers or unions to make election speeches on company time within 24 hours before the scheduled election. Under this prospective rule adopted after its decision in the instant case, it is clear that the Board would still regard petitioner's campaign speeches, which were made during working hours and, at least in part, within 24 hours of the first election, as sufficient to warrant setting aside the election.

tive bargaining unit "involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed." *Packard Motor Car Co.* v. *National Labor Relations Board,* 330 U. S. 485, 491. The court below, properly giving due weight to the Board's judgment and fully cognizant of its responsibility under the controlling test of judicial review enunciated by this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, considered the record as a whole and concluded that the Board's unit determination was adequately supported. That conclusion, clearly correct, presents no occasion for further review by this Court. Petitioner's further objection that (Pet. 32-37) the Board in determining the unit gave controlling weight to the extent of organization among the employees, contrary to the statute, is, as the court below held (Pet. App. p. 19), lacking in merit.[11]

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[11] The cases relied on by petitioner (Pet. 34-35) in which the Board has ruled a tailor shop unit to be inappropriate are readily distinguishable from the instant case. Because there had been a continuous history of satisfactory bargaining on a storewide basis in the *Robertson Brothers* case (95 NLRB 271), the Board concluded that it would not effectuate the policies of the Act to disrupt the status quo by carving out a splinter group. In *Carson Pirie Scott,* 75 NLRB 1244, *Mandel Brothers,* 77 NLRB 512, and *George B. Peck's, Inc.,* 96 NLRB 293, the Board decided that a proposed unit which included the men's alteration department but excluded the women's department was unduly artificial and based solely upon extent of organization. That the Board in some cases has included tailor shop employees in storewide units shows only that there may be, as is often the case, more than one appropriate unit.

4. Petitioner raises several objections to the Board's representation proceedings based on alleged lack of due process and failure to comply with the Administrative Procedure Act. None of these objections warrants review by this Court.

Petitioner's contention (Pet. 38-39) that the Board erred in failing to accord it a hearing in connection with its exceptions to the Regional Director's report recommending that the first election be set aside overlooks petitioner's express concession that it took no exception to the facts as reported (*supra,* p. 8). Since petitioner conceded these facts to be "undisputed" (R. 132) and requested a hearing only for the purpose of showing that the Union was able to communicate with the employees at places other than petitioner's premises, the Board, which had already ruled in other cases that such evidence was immaterial,[12] properly concluded that petitioner's exceptions raised no factual issue requiring further hearing. On the single material issue, whether the election should be set aside upon the undisputed facts, petitioner was heard in full, presenting its views in its exceptions and supporting brief. In these circumstances the claim of lack of due process is without

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See *National Labor Relations Board* v. *Grace Co.,* 184 F. 2d 126, 129 (C.A. 8); *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 113 F. 2d 698, 701 (C.A. 8), affirmed, 313 U.S. 146; *Mueller Brass Co.* v. *National Labor Relations Board,* 180 F. 2d 402, 405 (C.A. D.C.).

[12] *J. J. Newbury Co.,* 100 NLRB 1140, 1142; *Metropolitan Auto Parts, Inc.,* 99 NLRB 401, 402; *Onondaga Pottery Co.,* 100 NLRB 1143, 1144-1145.

merit. Cf. *Federal Communications Commission* v. *WJR,* 337 U. S. 265, 273-276; *Fay* v. *Douds,* 172 F. 2d 720, 724-725 (C. A. 2).

Equally unsubstantial is petitioner's assertion (Pet. 39-42) that the Board erred in issuing its Supplemental Decision and Direction of Election (finding, upon the Union's motion for reconsideration, that the proposed bargaining unit was appropriate) without a further hearing.[13] The Board had already held one hearing, and its determination that the tailor shop unit was in fact appropriate was based entirely upon facts contained in the record of that hearing (*supra,* pp. 5-6). Since the motion for reconsideration (R. 14-30) was devoted primarily to aguments with respect to facts established by the record, and petitioner's reply brief in opposition (R. 31-52) dealt extensively with each of those arguments, the Board reasonably concluded that "the record and the briefs * * * adequately set forth the issues, the facts material thereto, and the positions of the parties", and hence that there was no occasion for a further hearing (R. 98, n. 6). "[D]ue process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights

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[13] Petitioner's claim of conflict between the decision here and that of the Fifth Circuit in *National Labor Relations Board* v. *Sidran,* 181 F. 2d 671 (C.A. 5), is baseless. In that case the court held the Board's Regional Director had abused his discretion in failing to accord a hearing to one of the parties to adduce evidence on "strongly contested" issues of fact "vital" to the case (181 F. 2d at pp. 673-674). This clearly is not the situation here.

of parties." *Market St. Ry. Co.* v. *Railroad Comm'n,* 324 U. S. 548, 562. Cf. *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 152-153; *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U. S. 594, 598; *Inland Empire Council* v. *Millis,* 325 U. S. 697, 706.

5. Lastly, petitioner's contention that (Pet. 42-44) Section 3(a) of the Administrative Procedure Act precluded the Board from entertaining the Union's motion for reconsideration of the original unit determination (*supra,* p. 5) because the Board's Rules and Regulations do not specifically provide for reconsideration of a decision rests upon an obvious misconstruction of Section 3(a). The purpose of that section is to protect a party from being prejudiced by reason of his failure to resort to unpublished agency procedure. S. Doc. No. 248, 79th Cong., 2nd Sess., pp. 256, 314, and 356. Since a motion for reconsideration is not a procedure required or imposed by the Board as one of the necessary steps to be undertaken in the course of a representation proceeding, which if not pursued would adversely affect the party's position in the proceeding, it is not the type of procedure that falls within the contemplation of Section 3(a). Moreover, petitioner was in no way prejudiced by any lack of publication, for it was given notice of the filing of the motion and an adequate opportunity to reply (R. 30-31).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1954.

APPENDIX

The additional relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*), are as follows:

DEFINITIONS

Sec. 2. When used in this Act—

* * *

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

* * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

REPRESENTATIVES AND ELECTIONS

Sec. 9.(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

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